178 (1)
Supreme Court, U.S.
FILED
10-789 DEC 10 2010
OFFICE OF THE CLERK
William K. Suter, Clerk

No. 10-

IN THE

Supreme Court of the United States

PATRICK SHAWN BARRETT *et al.*,

Petitioners,

v.

COUNTY OF VENTURA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT

PETITION FOR A WRIT OF CERTIORARI

RICHARD L MOOMAU
MOOMAU & ASSOCIATES
300 Esplanade Drive
Suite 900
Oxnard, CA 93036
(805) 981-3979

MARK ALAN PAPAY
Counsel of Record
LAW OFFICE OF MARK ALAN PAPAY
300 E Esplanade Drive
Suite 900
Oxnard, CA 93036
(805) 981-3911
mark@landzoninglaw.com

Attorneys for Petitioners

233610

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED FOR REVIEW

1. In a case of first impression involving a matter of grave national importance and urgency, if a County uses private land for public street drainage for over 40 years with resultant destruction, is the County exempt from the payment of Constitutional just compensation to the landowners, merely because a prior owner offered dedication of an easement in that land to said County which it then rejected–but nonetheless used; and does such an exemption violate U.S. Constitutional provisions, including eminent domain, due process, and equal protection of the laws as outlined in its Fifth and Fourteenth Amendments?

2. In a matter of grave national importance and urgency, may a County use private land for public street drainage for over 40 years with resultant destruction, without any liability to pay Constitutional just compensation to the landowners, merely because said County acted reasonably?

PARTIES TO THE PROCEEDING

Petitioners Patrick Shawn Barrett and Patricia Chan are individuals who are married. Petitioners Morris Checansky and Iris Checansky are individuals who are married.

Respondent is the County of Ventura, a public entity.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW ...	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF APPENDICES	v
TABLE OF CITED AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
A. Government use, and the resultant destruction of private property resulting from a public project requires just compensation of the landowners, per the Fifth and Fourteenth Amendment to the U.S. Constitution	4
1. Part One of the Appellate Ruling ...	4
2. Part Two of the Appellate Ruling ...	5
3. No Authority Expressed for Ruling ..	5

Table of Contents

Page

4. U.S. Supreme Court Authority 8

5. Other Federal Authority 9

6. California Authority 10

B. Taking and damaging of private land by a government, combined with the denial of just compensation results in the denial of equal protection of the laws, and due process of law 11

C. Reasonableness does not exempt a County from payment of just compensation here 12

FACTUAL AND PROCEDURAL BACKGROUND 16

A. Procedural Background 20

REASONS FOR GRANTING THE PETITION 21

CONCLUSION 22

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, FILED JUNE 23, 2010 ..... 1a

APPENDIX B — MINUTE ORDER IN THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF VENTURA, DATED JUNE 15, 2007 ..... 22a

APPENDIX C — DECISON OF THE SUPREME COURT OF CALIFORNIA, DATED SEPTEMBER 15, 2010 ..... 27a

APPENDIX D — DECISION OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DATED JULY 22, 2010 ..... 28a

TABLE OF CITED AUTHORITIES

Page

CASES

Albers v. County of Los Angeles,
(1965) 62 Cal. 2d 250 [42 Cal. Rptr. 89, 398 P.2d 129] 10, 11

Barrett v. County of Ventura,
2010 Cal. App. Unpub. LEXIS 4754 ..... 2, 4, 13

Belair v. Riverside County Flood Control District,
(1988) 47 Cal. 3d 550 ..... 14, 15

Benton v. Maryland,
(1969) 395 U.S. 784, 89 S. Ct. 2056 12

Bunch v. Coachella Valley Water District,
(1997) 15 Cal. 4th 432 ..... 14, 15

Hampton v. Mow Sun Wong,
(1976) 426 U.S. 88, 96 S. Ct. 1895 12

Hazen Paper Co. v. Biggins,
507 U.S. 604, 113 S. Ct. 1701 (1993) 2

Holtz v. San Francisco Bay Area R.T.D.,
(1976) 17 Cal. 3d 648 10

Locklin v. City of Lafayette,
(1994) 7 Cal. 4th 327 ..... 14, 15

Cited Authorities

	Page
Marin v. City of San Rafael, (1980) 111 Cal. App. 3d 591	11
McMahans' of Santa Monica v. Aetna Life and Casualty Co., (1983) 146 Cal. App. 3d 683	11
Palko v. Connecticut, (1937) 302 U.S. 319, 58 S. Ct. 149, 82 L. Ed. 288	12
Patrick Shawn Barrett et al., v. County of Ventura, 2010 Cal. App. Unpub. LEXIS 4754; *rehearing denied* 2010 Cal. App. LEXIS 1329	1
Patrick Shawn Barrett v. County of Ventura, 2010 Cal. LEXIS 9830 (Cal. Sept. 15, 2010)	1
Skoumbas v. City of Orinda, 165 Cal. App. 4th	3, 13, 14, 15
Sei Fujii v. California, (1952) 38 Cal. 2d 718	12
Sheffet v. County of Los Angeles, (1970) 3 Cal. App. 3d 720	11
Shelley v. Kraemer, (1948) 334 U.S. 1	12

Cited Authorities

Page

Stoney Creek Orchards v. State of California,
(1970) 12 Cal. App. 3d 903 11

Summer Peck Ranch v.
Bureau of Reclamation,
(1993) 823 F. Supp. 715 10

United States v. Dickinson,
(1947) 331 U.S. 745 ..... 2, 8, 9

Yamagawa v. City of Half Moon Bay,
(2007) 523 F. Supp. 2d 1036 9

Yee v. City of Sausalito,
(1983) 141 Cal. App. 3d 917 11

Yue v. City of Auburn,
(1992) 3 Cal. App. 4th 751 11

STATUTES

Sup. Ct. R. 10(c) 2

Sup. Ct. R. 13.1 2

U.S. Const., Art. I, § 14 10

U.S. Const., Art. III, § 2 1

U.S. Const., Art. VI, cl.2 3

Cited Authorities

	Page
U.S. Const., Amend. 5	*passim*
U.S. Const., Amend. 14	*passim*
U.S. Const., Amend. 14, § 1	4
Cal. Const. Art. I, § 19	10

OPINIONS BELOW

The opinion of the California Court of Appeal is reported as *Patrick Shawn Barrett et al., v. County of Ventura* 2010 Cal. App. Unpub. LEXIS 4754; rehearing denied 2010 Cal. App. LEXIS 1329, per Appendix D. The opinion is set forth at Appe dix A.

Review was denied by the California State Supreme Court as *Patrick Shawn Barrett v. County of Ventura* 2010 Cal. LEXIS 9830 (Cal. Sept. 15, 2010) without published opinion. A copy of the order denying review is at Appendix C.

JURISDICTION

The judgment sought to be reviewed was entered on March 27, 2009, which included the sustaining of a demurrer to the Inverse Condemnation cause of action.

The opinion of the California Court of Appeal was filed on June 23, 2010.

Rehearing was denied by the California Court of Appeal on July 22, 2010. A petition for review by the California State Supreme Court was denied on September 15, 2010.

Article III, Section 2 of the Constitution of the United States confers jurisdiction upon this court.

The highest court of the State of California, the California State Supreme Court denied discretionary review of the decision of the California Court of Appeal.

Denial of discretionary review by the highest court of a state is deemed to render the decision with respect to which review is denied to be the decision of the court of last resort of a state. *Supreme Court Rule 13.1.*

Supreme Court Rule 10(c) provides that where a state court has decided an important question of federal law in a way that conflicts with relevant decisions of this court, the Court will consider review on *certiorari.* The decisions below concerning *Barrett, et al v. County of Ventura, supra,* directly conflict with Supreme court Decisional Authority, including *United States v. Dickinson* (1947) 331 U.S. 745, and the Fifth and Fourteenth Amendments of the U.S. Constitution.

This Court has jurisdiction to clarify standards in interpretation of the U.S. Constitution, including disapproval of lower court interpretations. *See Hazen Paper Co. v. Biggins,* 507 U.S. 604, 608, 113 S. Ct. 1701, 1705 (1993).

CONSTITUTIONAL PROVISIONS INVOLVED

The issues in this case stem from the Fifth and Fourteenth amendments to the United States Constitution. More specifically this case involves eminent domain power and the attendant requirement that just compensation must be paid when private land is taken and damaged for a public purpose, and the right to equal protection of laws and due process of law.

The Supremacy Clause of the Constitution provides in relevant part, "[T]he Laws of the United States * * * shall be the Supreme Law of the Land * * * any thing in

the Constitution or Laws of any State to the Contrary notwithstanding" *United States Constitution art. VI, cl.2.*

STATEMENT OF THE CASE

This case involves the creation by the California Court of Appeal of new and pervasive exemptions from the United States Constitution. The first exemption deletes the requirement of just compensation being paid to private landowners when their private land is taken and damaged for a public purpose, under the facts of this case. Under the ruling of the California Court of Appeal, if a government is offered dedication of a drainage easement on private land which it then rejects, said entity may proceed to use and cause the destruction of that land without payment of just compensation, merely because it had once rejected said dedication offer. However, the taking and destruction of land for a public purpose without just compensation, results in a violation of eminent domain and a denial of due process and equal protection of the laws.

In addition, the Court of Appeal ruled that a government may use private land for public street drainage with resultant damage - without the payment of Constitutional just compensation - given proof that it acted "reasonably", citing *Skoumbas* (*infra*).

The Court of Appeal provides no proper authority, and these rulings violate the United States Constitution, including the following:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation." *U.S. Constitution, amendment 5.*
>
> " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." *U.S. Constitution, amend. 14, sect. 1.*

A. Government use, and the resultant destruction of private property resulting from a public project requires just compensation of the landowners, per the Fifth and Fourteenth Amendments to the U.S. Constitution.

The ruling of the Court of Appeal is as follows:

> "The trial court sustained the county's demurrer on the inverse condemnation claim finding that (1) the pipe and the easement in which it lay belonged to the property owners and (2) the developer's offer of dedication was expressly rejected by the County . . . We affirm." *Barrett v. County of Ventura* 2010 Cal. App. Unpub. LEXIS 4754

1. Part One of the Appellate Ruling.

The *private* ownership of the pipe and would be easement area fixes not an obstruction to inverse condemnation, but a *prerequisite* to it. A government may only inversely condemn private property - property that it does not own.

2. Part Two of the Appellate Ruling.

The rejection of the offer of dedication, again, does not establish an impediment to inverse condemnation. Said rejection simply resulted in the preservation of the *private* status of the pipe and offered easement area. Such private status, again, establishes a prerequisite to inverse condemnation - not an obstruction. Thus a fundamental foundation for entity responsibility for just compensation is found, even in the ruling itself.

3. No Authority Expressed for Ruling.

Clearly, the use and damaging of private land for a public purpose requires Constitutional just compensation of the owners. The Court of Appeal offered no rationale or authority directed at its ruling that the offer of a public easement by a prior owner, followed by that government's rejection, vitiates the current owner's Constitutional right to just compensation. A summary of factual issues follows, which seem to have been confused by the Appellate Court.

There are *two* connected drainage systems alleged in this case. First, there is the public drainage system of formally accepted, publicly used and maintained streets, curbs, gutters, drain inlet and five feet of connected public drain pipe - which is *acknowledged by Respondents to be formally accepted and public.* Connected to this acknowledged public drainage system is a pipe which is sited on the Petitioners lands. The distinction between the private sited pipe and the acknowledged public drainage system seems to have caused confusion. See fn. 1, pp. 18-19 below.

A dispute arose as to whether the County of Ventura (hereinafter "County") formally accepted this privately sited pipe and related easement. The Petitioners, while alleging alternate theories such as the formal and implied acceptance of the *privately sited pipe*, relied on the simple allegation that the public drainage coursing from the formally accepted and public street drainage system, was the sole cause of the subject land failure. Therefore, as a public project is alleged as the sole cause of damage to private land, inverse condemnation is clearly applicable, thus the demurrer was affirmed in error.

It appears that the Court of Appeal confused these two connected systems, as it cited law supporting the position that drainage facilities that are not formally accepted and public - cannot be the basis for inverse condemnation liability. This authority *supports* the Petitioners' arguments, re: the alleged cause of damage. Here, again, while the status of the privately sited pipe was disputed, there was *no* dispute as to the formally accepted and public status of the public street drainage system. It is *this formally accepted public street drainage system* that is alleged as *the* cause of damage, and is a "public project," forming the basis for the inverse condemnation action.

Moreover, while the corrosion of the privately sited pipe is discussed in the complaint - the complaint *never* alleges said corrosion or a failure to maintain the privately sited pipe as the *cause of damage*, as reported in the Appellate Opinion. It was the public street drainage system, and not the privately sited pipe, that was alleged to be the cause of damage, as follows:

> "11. The public water coming from the public facilities described in paragraph 9 above [public streets, curbs, gutters, drain inlet and first five feet of drainpipe], was the actual and legal cause of the massive landslide on the plaintiffs' lands." *Petitioners' second-amended Complaint* (emphasis added)

Somehow, confusion re: the dual drainage systems seemed to combine with the thought that the offer of dedication by a prior owner gave the County a license or waiver allowing their damage of this private land. The Petitioners' thought is that the Court of Appeal may have morphed the dedication *offer* issue with the concepts of *implied* dedication. However, the Petitioners included the implied dedication allegation in their complaint, and offered this very alternative argument to the Court of Appeal, which the Court seemingly rejected. If an implied dedication were here established this would, again, serve to support inverse condemnation. If the pipe and easement were impliedly dedicated to the County by use, the subject pipe and easement were the County's. In that scenario, the impliedly dedicated and thus public drain pipe and public drainage easement on private land - caused the damage to private land by the alleged public street drainage which coursed through it. Thus, under this theory, inverse condemnation is also established.

Another Appellate thought may have been that the public use established a prescriptive easement. This alternative argument, as well, was made to the trial court and the Court of Appeal, and the Appellate Court refused to rule upon it. (See fn. 1, pp. 18-19 below) This,

as well, would support the Petitioner's allegation of inverse condemnation. Having adversely possessed the pipe and strip of land used for drainage, these became County facilities. When these facilities resulted in the destruction of the Petitioners' lands via the same public street drainage alleged, said lands were taken and damaged by the County.

The bottom line allegation that the County used private land for a public purpose and thus caused its damage, resulting in Petitioners' right to a trial in inverse condemnation, however, is simply inescapable. Nowhere in our Constitution or laws is there an exemption to the payment of just compensation, because a prior owner offered dedication of a public easement, which was rejected. Therefore, the Court of Appeal has ruled in a case of first impression in affirming the demurrer ruling, by erroneously carving out an exception to the Fifth and Fourteenth amendments to the U.S. Constitution.

4. U.S. Supreme Court Authority.

This court has not ruled in a matter involving inverse condemnation by use and damaging for more than 60 years, when it ruled in *United States v. Dickinson* (1947) 331 U.S. 745. Moreover, the Supreme Court, and other courts, have never ruled in a matter of a just compensation exemption based upon an offer of public easement dedication by a prior owner which was rejected, or an exemption for a government which acts "reasonably." The Court of Appeal rulings stand in stark opposition to the *Dickinson* (*Id.*) ruling, as well as the Fifth and Fourteenth amendments of the U.S. Constitution.

In *Dickinson* (*Id.*) the Supreme Court ruled that a government was responsible for the taking of a floodway course and damaging of private land caused by a government altered river. The government modified river imposed its new floodway course onto private land, and in so doing caused damage to that private land. The court held the entity liable both for the taking and damaging of the land, measured by the value of the floodway easement in addition to the cost to repair the land with an abutment. "Property is taken in the Constitutional sense when in-roads are made upon the owners' use of it to the extent that, as between private parties, a servitude has been acquired either by agreement or in course of time." *Dickinson* (*Id.*), p. 748.

In the instant matter, *Dickinson* (*Id.*) supports a finding of inverse condemnation. Public drainage being directed onto the Petitioners private land by a public street drainage system imposed its course onto private land, and in so doing caused damage to that private land. Given such a use of land "as between private parties, a servitude has been acquired." *Dickinson* (*Id.*). Such a use would have resulted in a prescriptive easement after a mere five years of use, with the attendant liability for damages caused by the adverse possessor. See prescriptive argument on Page 7, par. 3 above.

5. Other Federal Authority.

While not directly on point, a fairly recent federal court upheld the Constitutional principle of payment of just compensation as a result of a government taking or damaging of private land in *Yamagawa v. City of Half Moon Bay* (2007) 523 F. Supp. 2d 1036.

Similarly, the federal court upheld payment of just compensation with a governmental taking or damaging in *Sumner Peck Ranch v. Bureau of Reclamation* (1993) 823 F. Supp. 715.

6. California Authority.

The seminal California Supreme Court case in inverse condemnation by damaging is *Albers v. County of Los Angeles* (1965) 62 Cal. 2d 250, 263 [42 Cal. Rptr. 89, 398 P.2d 129]. *Albers* (*Id.*) established strict liability in inverse condemnation by damage: "Any actual physical injury to real property proximately caused by [a public] improvement as deliberately designed and constructed is compensable under article I, section 14, of our constitution whether foreseeable or not."

The issue in *Albers* (*Id.*) is the causation of damage by a public improvement to private property. This establishes inverse condemnation and the attendant liability to pay just compensation. There is no allowance for an exemption because a prior owner may have offered and easement for dedication, which was then rejected; or a government which acted "reasonably." Nor does the Constitution express or infer such an exemption.

The California Supreme Court followed *Albers* (*Id.*) when it ruled re: another public project caused land failure. "The authority for prosecution of an inverse condemnation proceeding derives from *Cal. Const. Art. I, § 19*, which provides in pertinent part that private property may be taken or damaged for public use only when just compensation has first been paid to the owner." *Holtz v. San Francisco Bay Area R.T.D.* (1976) 17 Cal. 3d 648, 652.

CALIFORNIA LOWER COURT CASES:

In all lower California cases, including the situation at bar where public project surface water caused damage, inverse condemnation strict liability applies. [*McMahans' of Santa Monica v. Aetna Life and Casualty Co.* (1983) 146 Cal. App. 3d 683; *Yee v. City of Sausalito* (1983) 141 Cal. App. 3d 917; *Marin v. City of San Rafael* (1980) 111 Cal. App. 3d 591; *Stoney Creek Orchards v. State of California* (1970) 12 Cal. App. 3d 903; and *Sheffet v. County of Los Angeles* (1970) 3 Cal. App. 3d 720].

See also, *Yue v. City of Auburn* (1992) 3 Cal. App. 4th 751, 759 ["A cause of action for inverse condemnation based on surface water damage must conform to the general inverse condemnation principles set forth in *Albers v. County of Los Angeles* (1965) 62 Cal. 2d 250 [42 Cal. Rptr. 89, 398 P.2d 129], and grounded in California's Constitution."]

B. Taking and damaging of private land by a government, combined with the denial of just compensation results in the denial of equal protection of the laws, and due process of law.

If a government denies these citizens their right to just compensation for land taken and damaged for a public purpose, they deny the equal protection of our Constitution. The County has taken the land of the Petitioners for use in public street drainage, and that public use caused significant damage to their land. By refusing just compensation, the Respondents refuse to equally protect these citizens with the constitutional guarantees of the Fifth Amendment, as well as the common law, statutory law, and case law as laid down by the U.S. Supreme Court.

Moreover, the taking of property without due process of law violates the Fourteenth amendment of our constitution. Where there is no "special national interest involved, the Due Process Clause has been construed as having the same significance as the Equal Protection Clause." *Hampton v. Mow Sun Wong* (1976) 426 U.S. 88; 96 S. Ct. 1895, 1904. Here, the County has interfered with the Petitioners' property rights, and Due Process includes the "rights to acquire, enjoy, own and dispose of property." *Shelley v. Kraemer* (1948) 334 U.S. 1, 10; *Sei Fujii v. California* (1952) 38 Cal. 2d 718. The test laid down for Due Process was whether the particular right is basic in a free society: "of the very essence of a scheme of ordered liberty . . . so that to abolish it is to violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Palko v. Connecticut* (1937) 302 U.S. 319; 58 S. Ct. 149, 152, 82 L. Ed. 288, 296. Taking private property without just compensation is a fundamental principal of justice and requires just compensation. *Benton v. Maryland* (1969) 395 U.S. 784; 89 S. Ct. 2056, 2062.

C. Reasonableness does not exempt a County from payment of just compensation here.

A County is not exempted from the payment of Constitutional just compensation for taking and damaging private land merely because it acted "reasonably". Neither the Constitution nor any U.S. Supreme Court ruling excuses a County from the payment of just compensation, based upon its reasonableness, for damages caused by the direct intrusion of public surface water. Also, see legal arguments and authorities on pp. 3-11, above.

The instant Court of Appeal applied another incorrect California Court of Appeal case, as follows:

> "The Court of Appeal reversed summary judgment for the city, concluding that 'the critical inquiry is not whether the entire system was a public improvement, but rather whether the [c]ity acted reasonably in its maintenance and control over those portions of the drainage system it does own . . . ' (*Skoumbas v. City of Orinda, supra,* 165 Cal. App. 4th at p. 787.) *Barrett v. County of Ventura* 2010 Cal. App. Unpub. LEXIS 4754.

Both *Skoumbas* (*Id.*), as well as the instant ruling are flatly wrong in their application of narrowly construed California Supreme Court riparian law. Moreover, these holdings violate the U.S. Constitution and U.S. Supreme Court authority. In addition these rulings violate public policy, as violations of common sense and common justice.

While the Supreme Court of California has applied a rule of reasonableness under narrow circumstances within province of riparian water law, such is not applicable here or in *Skoumbas.* These California Supreme Court cases apply only when, 1.) a plaintiff's land, which was *historically subject to river/stream flooding* and becomes gratuitously *protected* by a government levee or other flood control device which fails, or, 2.) when private property damage indirectly results from a government caused increase in surface water flow into a natural river or stream. These two circumstances had previously been *privileged* in

California under the "common enemy" and "natural watercourse" doctrines, but now result in potential government liability under a reasonableness test. Given either of the preceding two circumstances, a person may sue the government for damage to land in California. The instant case and *Skoumbas* (*Id.*) are cases of surface water damage caused by public street drainage. Neither case involves a river or stream or a failed levee or flood control device which was built and maintained by a government, or a surcharge of public surface water into a natural stream. The roots of this doctrine are in the California Supreme Court cases *Belair* (infra) and *Locklin* (infra), which are discussed in *Bunch* (*infra*), as follows:

> "In *Locklin*, we held that *Belair's* rule with respect to flood control projects and the 'common enemy' doctrine had broader application to cases in which a public entity deliberately drained excess surface water into a natural watercourse, which eventually caused damage to downstream property. (*Locklin, supra,* 7 Cal. 4th at p. 367) There, the owners of property along a creek and natural watercourse sued various public entities after public and private development eventually led to increased water flow in the creek, which damaged their property. Although we observed that the trial court erred in exempting the public entities from liability under *Archer's* 'natural watercourse' rule (*Archer, supra,* 19 Cal. 2d at p. 26), we nonetheless concluded that liability was unwarranted because plaintiffs failed to prove

> that any *unreasonable* public entity conduct caused their property damage (*Locklin, supra*, 7 Cal. 4th at p. 367).
>
> In a thoughtful discussion of the complex nature of water law and the archaic rules that traditionally governed liability questions, *Locklin* explained that following *Belair*, which involved only flood control projects, some lower courts continued to apply the *Archer* exception to cases in which the public entity invoked the natural watercourse rule. (*Locklin, supra*, 7 Cal. 4th at p. 366)." *Bunch v. Coachella Valley Water District* (1997) 15 Cal. 4th 432, 444-445 (citing *Belair v. Riverside County Flood Control District* (1988) 47 Cal. 3d 550; and *Locklin v. City of Lafayette* (1994), 7 Cal. 4th 327).

The instant Court of Appeal and the *Skoumbas* (*Id.*) Court are clearly in need of correction from the U.S. Supreme Court, as both have held that a government may, at its will, take private land for public use, and cause the destruction of that land - without Constitutional just compensation - if it merely acts "reasonably".

FACTUAL AND PROCEDURAL BACKGROUND

While the focus of this appeal is upon the Constitutional issues arising from the demurrer ruling which was affirmed by the Court of Appeal, many facts were established at the trial on the tort causes of action, and by briefing admissions, some of which are cited herein. See fn. 1, pp. 18-19 following.

The County had been offered an easement and pipe on private land for public street drainage by a land developer in 1963, as part of a tract development. Said County rejected the offer of dedication at that time. Nonetheless, County admittedly used said private land and pipe for County public street drainage since 1963. The County also used the subject private land and pipe to deliver the public street drainage to facilities owned and operated by the Ventura County Watershed Protection District, a separate public entity. It is acknowledged that the County did formally accept all streets, curbs, and gutters throughout this tract, as well as the drain inlet and first five feet of drain pipe within the public right-or-way abutting the Petitioners' home-sites - the undisputed source of damage causing water flow. Respondent has admitted that these public streets and public drainage systems have used the private land whereupon the Petitioners homes are now sited, for public drainage from 1963 to present.

In the years 2000 and 2004, the Petitioners became owners of the subject two homes. It is undisputed that County public street drainage caused a massive land failure on these private lands in January 2005, which has continuously worsened and now imminently

threatens the destruction of one of the two private homes involved in this matter. The cost of repair has been estimated at about two million dollars. The County has refused any form of help or compensation, and worse yet has obstructed mitigation efforts by these Petitioners who sought to prevent additional flows of public drainage onto their lands, in an effort to save their homes.

The County knew that this public street drainage system would trigger the destabilization of the subject properties as an identical drainage system on an adjacent public street caused a land failure, four years before the subject Petitioners' damage. The County admits that it was aware of this previous failure, but chose to do nothing - not even to warn the Petitioners. Absent any warning, the County left the Petitioners with no advanced opportunity to protect their land.

It was undisputed that the County's public street drainage system caused water to be diverted onto Petitioners' properties for over 40 years. Un-rebutted expert testimony showed the cause of the landslide and destabilization of Petitioners' properties to be the public drainage emanating from this public drainage system. A public project used private land for the public purpose of public street drainage, and in so doing caused destruction. See fn.1, below.

Following are a portion of the inverse condemnation allegations, which were the basis of the sustained demurrer with appellate affirmation:

"9. **The defendant did accept formal dedication** of Otero Court and other interconnected area streets known as Estaban Drive, Corriente Court and Cerro Crest Drive Drive as public streets on or about 1963. **Included in the formal acceptance by the County was the public drainage system** of street surface drainage, curbs and gutters within the aforementioned streets, as well as a storm drain inlet and storm drain pipe within the Otero Court public right of way. **This public drainage system presently drains directly onto the land of the plaintiffs, and has done so for over 43 years**. . . . 11. The resultant seepage of water, which continued for some period of time whenever there was public water flowing into the Otero Court public drain inlet, caused the strength of the soil mass to fail, and resulted in a massive landslide. **The public water coming from the public facilities described in paragraph 9 above, was the actual and legal cause of the massive landslide on the plaintiffs' lands.**" *Petitioners' second-amended Complaint* (emphasis added).[1]

---

1. In response to these allegations, in a sua sponte ruling on the validity of the tort causes of action - not raised in either parties' Appellate briefs - the Court of Appeal held:

> "Like the dangerous condition of public property cause of action, the nuisance claim is defeated because there was ***no allegation or evidence*** that County-owned property–i.e., the street, the drain opening or the drain inlet in the right of way — malfunctioned, was maintained improperly, ***or caused*** the landslide." *App. A, pg. 20a.* (emphasis added)

(Cont'd)

Damage caused by a public project without just compensation, constitutes an unlawful "taking" in violation of the Fifth and Fourteenth Amendments of the United States Constitution. Such an important constitutional right cannot be lost via a rejected offer to dedicate a land interest by the owner/developer more than 40 years before the subject damage, and decades before these Petitioners owned the subject homes. There is simply no basis in the Constitution or the law for such an argument.

(Cont'd)

Clearly, the Petitioners *did* allege that "County-owned property" "caused the landslide". Indeed, only proof of causation *was* required in nuisance, and in addition - proof of a dangerous condition in DCPP. Also, it was amplified to the Court of Appeal both in the Appellants' Reply Brief and Appellants' Petition for Rehearing, that the trial record shows that only two experts testified re: the cause of damage, both plaintiff experts, who established that the drainage water emanating from the County street and drainage facilities was the ***sole*** cause of damage to the land itself, as well as the privately sited pipe.

Other facts were established at trial, as well as in brief admissions - including public drainage acknowledgment.

The Petitioner's have been advised to limit their petition to the Constitutional issues of the demurrer ruling. However, at minimum, as the Petitioners felt that they would be disadvantaged if the Supreme Court was not aware of these matters, they raise these issues secondarily. The Court of Appeal actually ruled on only two of many tort trial appellate issues. In addition to refusing to rule on the issue of prescriptive easement (see p. 7, par. 3, above), most of the tort trial appeal issues raised were swept away based upon the above incorrect appellate ruling on the validity of the tort actions.

This case raises important questions regarding eminent domain, as well as equal protection and due process. Contrary to any authority at the Federal or State level, the California Court of Appeal held that a government may damage private land for a public purpose without just compensation, if a drainage easement on that land had once been offered to that entity for use, and rejected; or if that government merely acted "reasonably."

The Supreme Court of California having declined review of this matter, these plaintiffs petition for writ of certiorari to the Second District California Court of Appeal.

A. Procedural Background.

The trial court sustained a demurrer to the second-amended complaint on June 15, 2007, as to the inverse condemnation cause of action. The other two causes of action were tried with a jury and culminated in a judgment of no liability for defendant, County of Ventura, entered on March 27, 2009. An appeal was filed with the Second District California Court of Appeal, including the trial court's demurrer, on June 23, 2010. Many tort trial issues were raised on appeal, most of which the Court of Appeal refused to rule upon (see fn. 1, above). Rehearing was denied by the California Court of Appeal on July 22, 2010. A petition for review by the California Supreme Court was denied on September 15, 2010, without opinion.

REASONS FOR GRANTING THE PETITION.

Private property rights were forefront in the minds of our nation's founders, and a part of the U.S. Constitution. It is the very essence of our U.S. Constitution that is under attack here. The rulings of the California Court of Appeal absolutely violate the crux of private property rights, and the principle requiring the payment of just compensation when a government takes and/or damages private property for a public purpose. It is difficult to imagine a more fundamental violation of the U.S. Constitution. This case begs a corrective ruling from this, the highest court in the land.

The Respondent alleges that there are a multitude of similar scenarios with private lands being employed for public County drainage throughout this locale. Given the presence of a person or persons at the site of a landslide such as in the instant case - or at one of the County alleged drainage sites, a much greater catastrophe may manifest. Witness the nationally publicized land failure at La Conchita, within this very county, where 10 people were killed in 2005. The instant catastrophic land failure has crept to within a few feet of elderly Checansky's home, and they are unable to fund the 2 million dollar repair.[2]

---

2. If the court would consider personal urgency as germane: Mike Checansky's affliction with Parkinson's disease has worsened through this crisis. Shawn Barrett and Patty Chan attribute the years of anxiety from the threat of this land failure as the cause of their marital distress and divorce filing.

Absent intervention by this court, the County of Ventura will be free to wield its power to take and damage private land without compensation, and worse yet may cause the loss of lives. Other entities may take their cue from this terribly wrong ruling.

The U.S. Supreme Court has not ruled in an inverse condemnation case involving both a taking and damaging in more than 60 years. To the Petitioners' knowledge, the U.S. Supreme Court has never ruled on the effect of government "reasonableness" in inverse condemnation. No court has ever ruled upon an inverse condemnation case that turns upon a rejected offer of a public dedication by a prior landowner.

CONCLUSION

The Petitioners in this case are watching as a land failure caused by County's use of their land, both to drain public streets and to deliver said drainage to nearby public drainage facility, eats slowly away at the land upon which their homes are sited. Even at this moment the catastrophe worsens, and the County - with no remorse - mercilessly *continues* to allow its public street drainage to flow onto this failing and highly erodable land without interruption. These homes will ultimately be destroyed, absent costly repairs. The emotional distress is palpable. Yet the County stands by idly, providing not the least bit of assistance in abating this problem - and even hampering private mitigation efforts. The County refuses to acknowledge its responsibility for the proven adverse effects of a street drainage system which it approved, formally accepted, maintains, and has used for over 40 years. In so doing,

the County takes positions supported by the trial court and Court of Appeal that are contrary to public policy, the U.S. Constitution and existing law - based upon unconstitutional authority or newly forged and unconstitutional principles for which there are no published decisions in support.

This matter is at the same time profoundly important yet basic. The brevity of this petition signals the fundamental importance of this case. The Petitioners implore this court to come, not only to their rescue, but to the rescue of future victims and our Constitution. In a matter as simple as this, the Supreme Court could provide powerful correction and direction to the lower courts, as well as this County, with a minimum of its most valuable time and resources.

The Petitioners respectfully request that review be granted so that these important issues can be clarified, and a grave injustice can be avoided.

DATED: December 10, 2010

Respectfully submitted,

RICHARD L MOOMAU
MOOMAU & ASSOCIATES
300 Esplanade Drive
Suite 900
Oxnard, CA 93036
(805) 981-3979

MARK ALAN PAPAY
Counsel of Record
LAW OFFICE OF
MARK ALAN PAPAY
300 E Esplanade Drive
Suite 900
Oxnard, CA 93036
(805) 981-3911
mark@landzoninglaw.com

Attorneys for Petitioners

APPENDIX

APPENDIX A — OPINION OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, FILED JUNE 23, 2010

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

2d Civil No. B216531
(Super. Ct. No. 239187)
(Ventura County)

PATRICK SHAWN BARRETT *et al.*,

Plaintiffs and Appellants,

v.

COUNTY OF VENTURA,

Defendant and Respondent.

Adjacent property owners sued the County of Ventura on theories of inverse condemnation, dangerous condition of public property and private nuisance to recover damages from a landslide on their properties. They allege that the landslide resulted from the discharge of surface waters flowing through a leaking corrugated metal pipe running the length of their properties. The trial court sustained the County's demurrer on the inverse condemnation claim finding

that (1) the pipe and the easement in which it lay belonged to the property owners and (2) the developer's offer of dedication was expressly rejected by the County. A jury trial resulted in verdicts in favor of the County on the two remaining counts. We affirm.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Appellants Patrick Shawn Barrett and Patricia Chan own a hillside residential lot on Otero Court adjacent to a lot owned by appellants Morris Checansky and Iris Checansky. The lots were created in 1963 when the County approved a subdivision map for the Las Posas Estates Subdivision in an unincorporated area near the City of Camarillo. At the time of subdivision map approval, the County accepted the developer's offer to dedicate the streets within the subdivision=Otero Court, Estaban Drive, and Corriente Court -- for public use, including the drain openings and pipe inlets located within the area of the County's right of way. The County expressly rejected the developer's offer to dedicate a 15-foot wide, 265-foot long drainage easement along the boundary line between appellants' parcels.[1]

Prior to sale of the lots in the subdivision, the developer installed an 18-inch corrugated metal drainpipe in the easement. The purpose of the pipe was

---

1. The County also rejected two other drainage easements on private property in the subdivision at the time of subdivision map approval. Those easements are not involved in this lawsuit.

to drain surface waters from the subdivision's streets down the hillside to publicly-owned facilities draining to the ocean. Subsequently, a single family residence was constructed on each of the lots.

Barrett and Chan purchased their property in 2000. The Checanskys purchased their residence in 2004. On January 23, 2005, a landslide occurred on their properties. After inspection, appellants determined that the landslide was caused by corrosion of the storm drain pipe which allowed water to seep into and destabilize the hillside. Appellants filed a claim with the County under the Government Tort Claims Act. (Gov. Code, § 810 *et seq.*)[2] The County denied the claim.

Appellants then filed a complaint against the County for inverse condemnation, trespass, nuisance, dangerous condition of public property, and negligence alleging that the County is responsible for the landslide because it failed to maintain the drain pipe beneath their properties. The County filed an answer to the complaint asserting numerous affirmative defenses, including a defense based on the County's lack of ownership or control of the drain. The County alleged that it had rejected the developer's offer of dedication of the drain easement at the time it approved the final subdivision map for the tract in 1963.

After numerous pretrial motions-sa summary judgment motion, a motion for judgment on the

2. All statutory references are to the Government Code unless otherwise stated.

pleadings, two demurrers and a motion for nonsuit=decided by three different judges, failed to dispose of the action, the County succeeded in obtaining a dismissal of the inverse condemnation claim after the trial court sustained the County's demurrer to appellants' second amended complaint without leave to amend. The basis of the County's demurrer, as well as its other pretrial motions, was that the County had expressly rejected the developer's offer of dedication of the drainage easement, and the County had not designed, constructed or maintained the drain pipe. In opposition, appellants argued that an implied dedication occurred, and the pipe became a part of the County's public drainage system, because the streets in the subdivision, which the County had accepted for public use, were used to drain storm water from the subdivision into the pipe on appellants' properties.

The trial court sustained the demurrer on the ground that "there is no liability in inverse condemnation (although liability may lie in tort or other theories) where damages or failure of equipment are the result of negligent or inadequate operation and maintenance...." Subsequently, the claims for dangerous condition of public property and private nuisance were tried to a jury.[3] The jury rendered a special verdict finding in favor of the County on both claims and entered judgment accordingly.

---

3. Appellants voluntarily dismissed their claims for negligence and trespass prior to trial.

Appendix A

On appeal, appellants assert the trial court erred in sustaining the County's demurrer to the inverse condemnation claim because the court focused on the County's negligence only and "inverse condemnation may co-exist with negligence." Appellants also argue the demurrer was erroneously sustained because the County used the drain pipe on appellants' properties for a public use inasmuch as it directed storm water from public streets to drain through the pipe on its way to County-owned drainage improvements and the landslide was caused by the "public storm drainage." In addition, appellants argue that they alleged facts showing that the damage to their properties resulted from a public improvement functioning as intended. Lastly, appellants assert that the drain pipe on their properties was accepted by the County when it accepted the developer's dedication of the streets and other drainage improvements in the subdivision.

Appellants contend that the jury's verdict in favor of the County on their claims for dangerous condition of public property and private nuisance resulted from the trial court's error in (1) making findings as a matter of law that the drainpipe was not County property under theories of express or implied acceptance or prescriptive easement, (2) excluding evidence of the County's failure to inspect and maintain the drain pipe on appellants' properties, (3) prohibiting appellants from cross-examining the County's witness regarding formal acceptance of the drain pipe, (4) barring appellants' witness from testifying about street drainage issues, (5) barring appellants from submitting evidence regarding

the County's negligence in refusing to accept the dedication of the drain pipe, (6) instructing the jury that the County had no duty to warn appellants of the corroding pipe and highly erosive nature of the land, and (7) refusing to instruct the jury as to the rule of reasonableness when a property owner changes a natural system of drainage.

DISCUSSION

A. The County's Demurrer to the Inverse Condemnation Cause of Action Was Properly Sustained Without Leave to Amend

1. Standard of Review

We review an order sustaining a demurrer *de novo*, exercising our independent judgment to determine whether a cause of action has been stated under any legal theory. *(Ochs v. PacifiCare of California* (2004) 115 Cal.App..4th 782, 788.) We accept as true properly pleaded allegations of fact, but not contentions, deductions or conclusions of fact or law. *(Blankv. Kirwan* (1985) 39 Ca1.3d 311, 318.) We also consider matters subject to judicial notice. *(Dunn v. County of Santa Barbara* (2006) 135 Cal.App.4th 1281, 1298.) "The burden is on [appellant] to demonstrate the manner in which the complaint might be amended, and the appellate court must affirm the judgment if it is correct on any theory." *(City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445,459-460.)

Appendix A

2. The Law of Physical Takings

"The authority for prosecution of an inverse condemnation proceeding derives from article I, section 19, of the California Constitution. [Citation.] That section requires that just compensation be paid when private property is taken or damaged for public use. [Citation.] [~ The policy underlying the constitutional provision is to distribute throughout the community the loss inflicted upon the individual by the making of public improvements. [Citations.] Thus, a public entity may be liable in an inverse condemnation action for any physical injury to real property proximately caused by a public improvement as deliberately designed and constructed. [Citations.] [1] The principle of inverse condemnation, however, will not subject a public entity to general tort liability. [Citation.] If a plaintiff is unable to show that the public entity's conduct, although negligent, is in pursuance of a public use, an action based on inverse condemnation will fail." *(Yox v. City of Whittier* (1986) 182 Cal.App.3d 347, 351-352.)

The taking of private property for the purpose of constructing storm drainage systems has been recognized to be for a public use. *(Marin v. City of San Rafael* (1980) 111 Cal.App.3d 591, 595; *Ullery v. County of Contra Costa* (1988) 202 Cal.App.3d 562, 568; *DiMartino v. City of Orinda* (2000) 80 Cal.App.4th 329, 336.) "An action in inverse condemnation will lie when damage to private property is proximately caused by use of a storm drainage system for its intended purpose." *(Souza v. Silver Development Co.* (1985) 164 Cal.App.3d

165, 170.) When accepted and approved by a municipality, drainage systems become a public improvement and a part of the system of public works. (*Frustuck v. City of Fairfax* (1963) 212 Cal.App.2d 345, 358.) "The fact that the work is performed by a contractor, subdivider or a private owner of property does not necessarily exonerate a public agency, if such contractor, subdivider or owner follows the plans and specifications furnished or approved by the public agency. When the work thus planned, specified and authorized results in an injury to adjacent property the liability is upon the public agency under its obligation to compensate for the damages resulting from the exercise of its governmental power." (*Id.* at pp. 362-363; see *DiMartino, supra*, at pp. 338-339.)

3. The Law of Dedications

"Dedication of private property for public use requires an offer of dedication by the owner and an acceptance of the offer by the public entity." (*Ackley v. City Etc. of San Francisco* (1970) 11 Cal.App.3d 108, 112.) The "approval or 'acceptance need not be by formal action but may be implied from official acts of dominion or control over the property ... .' [Citation.] ... 'Use of the land [for a public purpose] over a reasonable period of time constitutes an acceptance ... , without any formal action in relation thereto by governmental authority ....'" (*Marin v. City of San Rafael, supra*, 111 Cal...App.3d at pp. 595-596.) "On the other hand, where 'there is no acceptance of a street or the drainage system within it, there is no public improvement, public work or public

use and therefore there can be no public liability for inverse condemnation.'" *(Ullery v. County of Contra Costa, supra,* 202 Cal.App.3d at pp. 568-569.)

The filing of a subdivision map delineating an easement is an offer to dedicate the land. *(Biagini v. Beckham* (2008) 163 Cal.App4th 1000, 1009.) But the approval of plans or maps and issuance of permits by a public entity to a private property owner for the construction of private improvements are not alone sufficient to evidence the requisite dominion and control by the public agency. *(Yox* v.. *City of Whittier, supra,* 182 Cal.App.3d at pp. 354-355; *Ullery v. County of Contra Costa, supra,* 202 Cal.App.3d at pp. 570-572; *DiMartino v. City of Orinda, supra,* 80 Cal.App.4th at pp. 339-340.) A statutory dedication is effected when, in compliance with the Subdivision Map Act then in force, an offer of dedication is accepted by the public agency. *(Galeb v. Cupertino Sanitary Dist.* (1964) 227 Cal.App.2d 294, 301.) Formal acceptance of a dedication may either be by notation on the final map or by later resolution. *(Ullery, supra,* at p. 567, fn. 1.) A dedication is not complete until the offer has been accepted by the appropriate official governing body or designated office having jurisdiction over the property offered for dedication. (§ 66477.3; see *DiMartino, supra,* at p. 343 ["it is well established that such words of dedication on the map do not *accomplish* a dedication, even upon recordation and filing of the map"].) Until accepted, title to the dedicated property does not pass to the public agency. (§ 66477.1; see *Mikels v. Rager* (1991) 232 Cal.App.3d 334, 351 [until offer of dedication is unconditionally accepted no public interest is created].)

A statutory offer of dedication that has not been formally accepted, however, does not rule out the possibility of a common law, or implied, dedication, which may arise when the offer is impliedly accepted from the public's use of the subject property over a reasonable period of time. (See *Biagini v. Beckham, supra,* 163 Cal.App.4th at p. 1009 [III ... Use of the land so identified by the public for such purposes over a reasonable period of time constitutes an acceptance of the offer so made [citations], without any formal action in relation thereto by governmental authority ... 11I].) Without formal acceptance, dominion and control exercised by the public entity over property necessary for inverse liability may be implied from the performance by the entity of maintenance and repair work or other official acts of control over the property. *(Ackley v. City Etc. of San Francisco, supra,* 11 Cal.App.3d at p. 113; *Yox v. City of Whittier, supra,* 182 Cal.App.3d at p. 353; *Ullery v. County of Contra Costa, supra,* 202 Cal.App.3d at pp. 568-569.) In addition, public use may be proof of the County's acceptance of the dedication. (See *Hanshaw v. Long Valley Road Ass'n* (2004) 116 Cal.App.4th 471, 482 [filing subdivision map delineating a street thereon is an offer to dedicate the land identified; use of the land so identified by the public for such purposes over a reasonable period of time constitutes an acceptance of the offer so made].)

4. No Implied Dedication

Here, the subdivider's offer of dedication of the drainage easement on appellants' property was

expressly rejected by the County[4] It is undisputed that the County did not install, or supervise the installation of, the drainpipe. It is also undisputed that the County did not inspect, maintain or repair the pipe over the many years of its existence. The second amended complaint contains no facts showing that the County exercised dominion or control over the easement in any other manner. (See *Ackley v. City Etc. of San Francisco, supra*, 11 Cal.App.3d at pp. 113-114 [city not liable for injuries where there was no evidence of any exercise of dominion or control by city by making repairs to the road, inspecting it, or acting in any other way so as to imply acceptance].) Without such incidents of ownership or control, the easement is nothing more than a private easement between the developer and the property owners. (See *Yox v. City of Whittier, supra*, 182 Cal.App.3d at p. 353 [no authority exists for holding a city liable in inverse condemnation for injury to private property within a subdivision resulting from completely private construction-privately designed, financed and built-where the city's sole affirmative action was the issuance of permits and approval of the subdivision map].)

---

4. Although the second amended complaint alleges that the easement was formally accepted by the County, we disregard the allegation because respondent has provided conclusive evidence that the County formally rejected the offer of dedication of the drainage easement when it approved the subdivision map. (Evid. Code, §§ 452, 459 [appellate court may take judicial notice of official acts of public entities].)

Nonetheless, appellants assert that an implied dedication occurred because the drainpipe has been used since its installation for the public purpose of draining surface water from public streets in the subdivision. The law is to the contrary. Public use "may imply an offer to dedicate but may not, in itself, constitute an acceptance for the purpose of imposing liability on a public entity." *(Ackley v. City Etc. of San Francisco, supra,* 11 Cal.App.3d at p. 113, fn. 3.) "The rationale behind this rule is that 'to permit a small segment of the public by use of a private way to impose the burden of maintaining it upon the general public would be in dereliction of the powers of the elected officials, and permit the establishment of public roads in undesirable places.'" *(Ibid.)*

Chatman v. Alameda County Flood Control Etc. Dist. (1986) 183 Cal.App.3d 424, is instructive. In that case the plaintiffs property was damaged by corrosion of a culvert under her home. The culvert was the work of a developer in the early part of the century and covered part of a major drainage creek. The defendant flood control district, created in 1949, took over inspection of this area from the city in 1963. Over the years, numerous inspections revealed that the culvert pipe was severely corroded. The plaintiff conceded the district did not own the culvert, but attempted to establish liability based on control.

The district had, several years earlier, agreed to assume full responsibility for creek channels once certain conditions were met and had assumed maintenance

responsibility for some portions of the creek, but not for that portion running under plaintiff's home. The appellate court held that the plaintiff had failed to establish that the district controlled the culvert. "Nor are the inspections conducted by the District sufficient to show control of the culvert. The inspections were made either to implement the flood control objectives of the [flood control] project or in response to individual complaints. All of the inspections were necessary to insure effective, continued control of runoff waters. Despite appellant's arguments to the contrary, there was no evidence that the District controlled the culvert." *(Chatman v. Alameda County Flood Control Etc. Dist., supra,* 183 Cal.App.3d at p. 431.)

Similarly, in *Ullery,* the court concluded that, even though use of private land for a public purpose over time may constitute implied acceptance of an offer of dedication, the public entity must still take affirmative steps to exhibit dominion or control over the property through participation in its improvement, maintenance, or repair in order to evidence the public entity's acceptance and lead to a finding of public use. *(Ullery v. County of Contra Costa, supra,* 202 Cal.App.3d at pp. 568-570.) The Court of Appeal held that the fact the subject property was part of the drainage system of a larger 40-acre watershed was not alone sufficient to overturn the trial court's finding of no public use in the absence of any exhibition of dominion or control by the public entity. *(Id.* at pp. 569-570.)

In *DiMartino,* a similar contention was made and rejected. The court stated: "The key question is whether connection of a private pipe segment to an admittedly public pipe segment converts the former to a public improvement. As the City points out, such a rule would allow circumvention of the Subdivision Map Act: a developer would no longer need to comply with requirements of dedication and acceptance, connection of any pipe on private property to a public roadway cross-culvert would transform the private pipe to a public one. We have found no case recognizing such a doctrine." *(DiMartino v. City of Orinda, supra,* 80 Cal.App.4th at p. 343.)

Appellants' reliance on *Skoumbas v. City of Orinda* (2008) 165 Cal.App.4th 783, is misplaced. In that case, the property owners sued the city when their property was damaged by erosion caused by surface water discharged onto their property from a storm drain located on the property of an uphill landowner. *(Id.* at pp. 787-790.) The Skoumbas property was in the Oak Springs subdivision created in the 1920's, downhill from a different subdivision developed in the 1960's. That subdivision included Candlestick Road, a publicly dedicated street that ended in a cul-de-sac. Surface water from the surrounding area of the subdivision flowed onto Candlestick Road, and was collected in a catch basin that channeled the water into an underground metal pipe. The metal pipe ran underneath the subdivision and continued downhill into the Oak Springs subdivision. There it discharged surface water onto property uphill of the Skoumbas property that

flowed down onto the Skoumbas property, causing substantial erosion and damage. The city admitted it owned Candlestick Road, the catch basin, and the first 40 feet of the drainpipe. The city contended that it was not responsible for any flow of water below the first 40 feet of pipe because the rest of the drainpipe was privately owned. *(Id.* at pp. 787-788.)

The Court of Appeal reversed summary judgment for the city, concluding that "the critical inquiry is not whether the entire system was a public improvement, but rather whether the [c]ity acted reasonably in its maintenance and control over those portions of the drainage system it does own..." *(Skoumbas v. City of Orinda, supra,* 165 Cal.App.4th at p. 787.) The court relied on cases involving diversion of surface waters into a natural watercourse in applying a rule of reasonableness. (See *Locklin v. City of Lafayette* (1994) 7 Cal.4th 327, 351 ["a landowner's conduct in using or altering the property in a manner which affects the discharge of surface waters onto adjacent property is subject to a test of reasonableness"].)

The critical difference between *Skoumbas* and the instant case is that in *Skoumbas,* the damage was caused by discharge of surface waters *onto* the Skoumbas property. Here, the damage to appellants' property, like the damage in *DiMartino,* was not caused by surface waters flowing onto the property, but by the failure of a drainpipe underneath appellants' property that was owned and controlled by the appellants. (See *Skoumbas v. City of Orinda, supra,* 165 Cal.App.4th at p. 795

["Unlike *DiMartino*, this case does not involve the failure, replacement and relocation of a secret subterranean drain"].)[5]

Appellants' argument that the trial court erred in refusing to allow them to amend their complaint also is without merit. Appellants have had two opportunities to amend the allegations in the complaint and three different judges have found the allegations insufficient to state a cause of action. No inverse condemnation claim has been stated, nor can one be stated, because the undisputed facts show that the drainpipe was privately constructed and located on private land, the County expressly rejected the easement, and it has not exercised dominion or control over the pipe in any manner. A private drain on private property does not become a public work merely because public water drains through it or permits are issued for it. Liability is imposed only if the public entity has either accepted an offer of dedication or exercised dominion and control over the private drain. Because none of these conditions is present here, inverse condemnation liability cannot be imposed on the County.

---

5. Appellants also argue that approval of the subdivision map triggers inverse condemnation liability when damage to adjacent property results from improvements shown on the map, relying on *Sheffet v. County of Los Angeles* (1970) 3 Cal.App.3d 720, 733-734. As discussed above, this argument is foreclosed by the multitude of cases decided since *Sheffet* holding that inverse condemnation liability cannot be based solely on approval of subdivision maps. *(Yox v. City of Whittier, supra,* 182 Cal.App.3d at pp. 354-355; *Ullery v. County of Contra Costa, supra,* 202 Cal.App.3d at pp. 570-572; *DiMartino v. City of Orinda, supra,* 80 Cal.App.4th at pp. 339-340.)

B. The Tort Claims Verdict Was Correct

Like the claim for inverse condemnation, the gravamen of appellants' tort claims is damage they sustained to their real property as a result of the corroded metal drainpipe on their property. While, in some instances, liability against a public agency in tort may lie even though a claim for inverse condemnation will not, this is not such a case. The facts that preclude imposition of liability on the County for inverse condemnation bar liability in tort under the theories of dangerous condition of public property or nuisance.

Section 815 provides that a "public entity is not liable for an injury" "[e]xcept as otherwise provided by statute." Thus, in California "'all government tort liability must be based on statute [citation].'" *(Hoff v. Vacaville Unified School Dist.* (1998) 19 Cal.4th 925, 932.)

Section 815.6 states: "Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty."

1. No Dangerous Condition of Public Property

Appellants assert that the County is liable in tort under section 835. That statute provides that a public

entity is liable for foreseeable injury caused "by a dangerous condition of its property" if the condition was caused by a negligent act or omission of an employee or if the public entity had actual or constructive notice of the condition in sufficient time to have taken appropriate precautions. *(Mamola v. State of California ex rel. Dept. of Transportation* (1979) 94 Cal.App.3d 781, 788.) The scope of government liability under section 835 and the extent of the duties imposed are questions of law. *(Id.* at p. 790; see also *Haggis v. City of Los Angeles* (2000) 22 Cal.4th 490, 499 ["Whether an enactment creates a mandatory duty is a question of law"]; *Tilton v. Reclamation Dist. No. 800* (2006) 142 Cal.App.4th 848, 860 [same].)

"Property of a public entity" or "public property" means property "owned or controlled" by a public entity. (§ 830, subd. (c).) Thus, section 835 permits suits against governmental entities for dangerous conditions of property, but only if the property is owned or controlled by the government entity. *(Washington v. County of Contra Costa* (1995) 38 Cal.App.4th 890, 900.) "For liability to be imposed on a public entity for a dangerous condition of public property, the entity must be in a position to protect against or warn of the hazard." *(Mamola v. State of California ex rel. Dept. of Transportation supra,* 94 Cal.App.3d at p. 788.)

As discussed earlier, there was no evidence that the County owned or controlled the drainpipe. The evidence showed that the County had expressly rejected the subdivider's offer of dedication of the drainage easement at the time it approved the subdivision map.

There was no evidence that the County asserted any control over the easement or drainpipe in any other manner. (See *Huffman v. City of Poway* (2000) 84 Cal.App.4th 975, 988, fn. omitted ["A public entity is liable for dangerous conditions on property it owns [citation] but not for dangerous conditions on private property"].)

Appellants assert that the County's failure to exercise control over the easement and drainpipe should subject it to liability because it had an affirmative duty to maintain the drainpipe. We disagree. Only an express acceptance or acts of dominion or control over the pipe could have created such a duty. Absent such a duty, there is no basis for holding the County liable for damages caused by corroding of the pipe.

Appellants attempt to circumvent this obstacle by arguing that the County's ownership of Otero Court, the drain opening and drain inlet within the street right-of-way is sufficient to impose liability for damages caused by failure of the private drainpipe. It is a correct proposition of law that property of a public entity may be considered dangerous if it creates a substantial risk of injury to adjacent property or to persons on adjacent property and its own property may be considered dangerous if a condition on the adjacent property exposes those using the public property to a substantial risk of injury. *(Mamola v. State of California ex rel. Dept. of Transportation, supra,* 94 Cal.App.3d at p. 791.) However, there was no allegation or evidence that the street, the drain opening or the drain inlet in the right of way malfunctioned, was maintained improperly, or caused the landslide.

2. No Nuisance

Appellants' second tort theory is based on nuisance. (Civ. Code, § 3479.) They contend that the public storm water draining through the drainpipe on their property caused the landslide and interfered with their comfortable enjoyment of life. Like the dangerous condition of public property cause of action, the nuisance claim is defeated because there was no allegation or evidence that County-owned property--*i.e.*, the street, the drain opening or the drain inlet in the right of way--malfunctioned, was maintained improperly, or caused the landslide. *(Longfellow v. County of San Luis Obispo (1983)* 144 Cal.App.3d 379, 384 ["We deem it proper in this case where the action is based on a claim of a defective condition of public property to follow the reasoning of the *Mikkelson v. State of California* (1976) 59 Cal.App.3d 621] court and find the plaintiffs have no cause of action under a nuisance theory"].)[6]

---

6. Another obstacle to recovery under a nuisance theory is contained in Civil Code section 3482, which states that "[n]othing which is done or maintained under the express authority of a statute can be deemed a nuisance." The California courts consistently hold that alleged nuisances arising from the construction, operation and maintenance of streets and highways to be within the protection of Civil Code section 3482. *(Dina v. People ex rel. Dept. of Transp.* (2007) 151 Cal.App.4th 1029, 1052; see also *Longfellow, supra,* at p. 385 ["Streets and Highways Code section 27 provides that: 'The degree and type of maintenance for each highway, or portion thereof, shall be determined in the discretion of the authorities charged with the maintenance thereof, taking into consideration traffic requirements and moneys available therefor.' It is clear that the location, scope and character of street maintenance and repair work is discretionary and not mandatory in nature"].)

Appendix A

Because the factual predicates for appellants' tort claims do not exist and the County has no liability as a matter of law, appellants' assertions that the trial court erred in excluding evidence and instructing the jury necessarily fail.

CONCLUSION

The County cannot be liable for the malfunction of a private improvement on private property in the absence of an exercise of a dominion or control. Under the undisputed facts of this case, the County's tort liability was subject to determination, and could have been determined, without the expenditure of time and money a jury trial entailed.

The judgment is affirmed. Respondent shall recover costs on appeal. *NOT TO BE PUBLISHED.*

PERREN, J.

We concur:

YEGAN, Acting P.J.

COFFEE, J.

APPENDIX B — MINUTE ORDER IN THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF VENTURA DATED JUNE 15, 2007

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF VENTURA
VENTURA

MINUTE ORDER

Date: 06/15/2007
Judicial Officer Presiding: Judge David Long
Clerk: Sherry Jacoby
Time: 02:50:47 PM Dept: 22

Case Title: PATRICK SHAWN BARRETT VS COUNTY OF VENTURA

Case No: CIV239187

Case Category: Civil-Unlimited

Case Type: Eminent domain/Inverse condemnation

Event Type:

RULING ON DEMURRER BY COUNTY OF VENTURA TO SECOND AMENDED COMPLAINT OF PLAINTIFF PATRICK SHAWN BARRETT

On June 14, 2007 the court heard oral argument in the demurrer of defendant, County of Ventura, to the first cause of action of the second amended complaint of plaintiff, Patrick Shawn Barrett.

Appendix B

Prior to that hearing the court published a detailed tentative ruling on its website. Counsel for the parties had reviewed the tentative ruling prior to the time of the hearing. Following oral argument the court took the matter under submission and now its issues its ruling on the demurrer.

First, the court adopts that portion of its tentative ruling by which it indicated an intention to deny plaintiff's request for judicial notice of the deposition transcript of William Butch Britt. Judicial notice of that deposition transcript is denied.

Second, with regard to defendant's demurrer to the first cause of action of plaintiff's second amended complaint, the court reiterates the ruling it made from the bench regarding reference to or use of facts "established" in the motion for summary judgment by defendant County of Ventura and heard and ruled upon December 11, 2006. Although the court found certain material facts to be "undisputed" or "established" that finding was expressly stated by the court to be " for purposes of this motion only". Those "undisputed" or "established" facts for purposes of the summary judgment motion heretofore ruled upon (and denied) have no bearing on this court's ruling on the demurrer. A demurrer can be used only to challenge defects that appear on the face of the pleading under attack or for matters outside the pleading that are judicially noticeable (Blank v. Karwan (1985) 39 Cal. 3d 311, 318) No other extrinsic evidence can be considered. (*Ion Equipment Corporation v. Nelson (1980) 110 Cal. App. 3d 868*).

Appendix B

In the case of *Customer Company v. City of Sacramento* (1985) 10 Cal. App. 4th 368 then Justice Ronald George provided a veritable treatise on the history and substance of inverse condemnation law in affirming a ruling of the lower courts which granted a judgment on the pleadings in favor of the defendant. In that case, with reference to a 1944 case, *House vs. Los Angeles County Flood Control District*, 25 Cal. 2d 384, the court noted the requirement that the destruction of damaging of property must be "... sufficiently connected with the 'public use' as required by the constitution ..... if the injury is a result of dangers inherent in the construction of the public improvement as distinguished from dangers arising from the negligent operation of the improvement." (Customer Company, supra page 382)

Damage resulting from negligence in routine operations having no relation to the function of the government project as conceived is not a "taking" for public use and therefore cannot be the basis for a claim of inverse condemnation. As stated in *Sheffet v. County of Los Angeles* (1970) 3 Cal. App. 3d 720, 733-734, " ..... [I]nverse condemnation does not involve ordinary acts of carelessness in the carrying out of the public entity's program ... property is only deemed taken or damaged for public use if the injury is a necessary consequence of the public project."

More recently *Tilton v. Reclamation District* (2006) 142 CA 4th 848 cites a multitude of other cases all holding, in substance, that there is no liability in inverse condemnation (although liability may lie in tort or other

theories) where damages or failure of equipment are the result of negligent or inadequate operation and maintenance.

Thus, turning to the operative complaint, plaintiff's second amended complaint and the first cause of action thereof, there is no allegation, and it is in fact conceded, that the segment of drainpipe that "corroded over time and ruptured" (second amended complaint, page 3, line 11) was ever installed by or owned by defendant County of Ventura.

Whether or not the County of Ventura did in fact accept formal dedication of the easement (and by implication the privately owned and installed drainpipe to which the roadway storm drains were attached) or impliedly accepted both the easement and the pipe, the operative allegations of the second amended complaint (and the two complaints that preceded it) are that over a period of between 30 and 42 years the storm drainage pipe "had corroded over time and ruptured ..." resulting in a period of seepage of water which, over time, "... caused the strength of the soil mass to fail, and resulted in a massive landslide." (Second amended complaint, paragraph 11, page 3, lines 11-15). Implicit in these allegations are the premises that the county failed to inspect and maintain the pipe over this period of time causing its failure, the subsequent seepage and the resulting landslide.

Thus, under the authority of *Tilton*, *supra*, and its antecedents, it cannot be said or even inferred that the damage is the result of "a necessary consequence of a public project or is inherent in the construction of a public improvement," as distinguished from the dangers

arising from the negligent operation or negligent inspection or negligent failure to inspect the improvement. The court cannot foresee, given the evolution of these pleadings, how plaintiff will be able to successfully amend to state a cause of action in inverse condemnation.

Accordingly, the court concludes that its tentative ruling was not as well reasoned as, in retrospect, the court wishes it had been. The court compliments both counsel for the saliency and tight focus of their oral arguments.

The demurrer to the first cause of action of the second amended complaint is sustained without leave to amend.

Defendant is to answer the remaining causes of action on or before July 4, 2007.

The clerk is to give notice.

APPENDIX C — DECISION OF THE SUPREME COURT OF CALIFORNIA, DATED SEPTEMBER 15, 2010

Court of Appeal, Second Appellate
District, Division Six
No. B216531

8185000

IN THE SUPREME COURT OF CALIFORNIA

En Banc

PATRICK SHAWN BARRETT et al.,

Plaintiffs and Appellants,

v.

COUNTY OF VENTURA,

Defendant and Respondent.

The motion for calendar preference filed on August 9, 2010 is denied.

The petition for review is denied.

GEORGE
Chief Justice

APPENDIX D — DECISION OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT DATED JULY 22, 2010

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

DIVISION 6

B216531
Ventura County No. 239187

July 22, 2010

Richard L. Moomau
Moomau & Associates
300 Esplanade Dr. #900
Oxnard, CA 93030

PATRICK SHAWN BARRETT et al.,

Plaintiffs and Appellants,

v.

COUNTY OF VENTURA,

Defendant and Respondent.

THE COURT:

Petition for rehearing is denied.

cc: All Counsel
File

179

(2)

No. 10-789

IN THE

Supreme Court of the United States

PATRICK SHAWN BARRETT, et al.,

Petitioners,

v.

COUNTY OF VENTURA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

BRIEF IN OPPOSITION

ALAN E. WISOTSKY
Counsel of Record
JEFFREY HELD
LAW OFFICES OF ALAN E. WISOTSKY
300 Esplanade Drive, Suite 1500
Oxnard, California 93036
(805) 278-0920
lawyers@wisotskylaw.com

Attorneys for Respondent

QUESTIONS PRESENTED

1. Does the failure of petitioners (as well as respondent and any judge at the three levels of the state court system) to mention the existence of any federal or federal constitutional provisions preclude them from raising such an issue for the first time in a federal appeal?

2. Does res judicata, collateral estoppel, or any doctrine of former adjudication bar relitigation of petitioners' claims, which were thoroughly presented to and rejected by a state superior court jury during eight days of trial in January of 2009; confirmed by the trial court judge; unanimously affirmed in full by the state court of appeal, which also denied petitioners' reconsideration petition; and which the California Supreme Court declined to disturb?

3. If this Court were to reach the takings claims raised for the first time in the pending certiorari petition, would federal law construing the Takings Clause of the Fifth Amendment differ from California law of inverse condemnation, which requires some conscious or deliberate government decision causally connected to the land failure, in order to approximate eminent domain?

4. Can a local government be strictly liable for the unaltered topographical terrain, in this case involving a slightly downsloping street in a residential housing tract?

5. Is petitioners' attack upon the California Supreme Court decision implementing a rule of reasonableness for the evaluation of surface water drainage claims against municipalities, which allows consideration of misconduct of the plaintiff landowners, inconsistent with the United States Constitution?

IDENTITY OF THE RESPONDENT

The respondent, the County of Ventura, is a municipality which is one of 58 counties in the State of California. There are no associated defendants/ respondents.

TABLE OF CONTENTS

Page

Questions Presented i

Identity of the Respondent iii

Table of Contents iv

Table of Citations vi

Procedural History 1

Statement Contesting Jurisdiction 5

Facts Relevant to the Petition 5

Does the Failure of Petitioners (as Well as Respondent and Any Judge at the Three Levels of the State Court System) to Mention the Existence of Any Federal or Federal Constitutional Provisions Preclude Them from Raising Such an Issue for the First Time in a Federal Appeal? 9

Contents

Page

Does Res Judicata, Collateral Estoppel, or Any Doctrine of Former Adjudication Bar Relitigation of Petitioners' Claims, Which Were Thoroughly Presented to and Rejected by a State Superior Court Jury During Eight Days of Trial in January of 2009; Confirmed by the Trial Court Judge; Unanimously Affirmed in Full by the State Court of Appeal, Which Also Denied Petitioners' Reconsideration Petition; and Which the California Supreme Court Declined to Disturb? 10

If this Court Were to Reach the Takings Claims Raised for the First Time in the Pending Certiorari Petition, Would Federal Law Construing the Takings Clause of the Fifth Amendment Differ from California Law of Inverse Condemnation, Which Requires Some Conscious or Deliberate Government Decision Causally Connected to the Land Failure, in Order to Approximate Eminent Domain? 17

Can a Local Government Be Strictly Liable for the Unaltered Topographical Terrain, in This Case Involving a Slightly Downsloping Street in a Residential Housing Tract? 24

Contents

Page

Is Petitioners' Attack upon the California Supreme Court Decision Implementing a Rule of Reasonableness for the Evaluation of Surface Water Drainage Claims Against Municipalities, Which Allows Consideration of Misconduct of the Plaintiff Landowners, Inconsistent with the United States Constitution? 25

There Are Multiple Misstatements of the Record in the Certiorari Petition 33

Conclusion 37

TABLE OF CITATIONS

Cases Cited:

Brodheim v. Cry
584 F.3d 1262 (9th Cir. 2009) 12, 13, 15

Citizens for Open Access, etc. v. Seadrift
60 Cal.App.4th 1053 (1998) 13

City of Martinez v. Texaco Trading
353 F.3d 758 (9th Cir. 2003) 13

Connecticut General v. New Images
321 F.3d 878 (9th Cir. 2003) 10

Contents

Page

Doi v. Halekulani
276 F.3d 1131 (9th Cir. 2002) 10

Eichman v. Fotomat
147 Cal.App.3d 1170 (1983) 13, 15

Howlett v. Rose
496 U.S. 356 (1990) 9

In re America West
217 F.3d 1161 (9th Cir. 2000) 10

Kremer v. Chemical Construction
456 U.S. 461 (1982) 16

Lingle v. Chevron
544 U.S. 528 (2005) 11

Locklin v. City of Lafayette
7 Cal.4th 327 (1994) 7, 8, 26-30

Long v. Shorebank Development
182 F.3d 548 (7th Cir. 1999) 11

Marrese v. American Academy
470 U.S. 373 (1985) 11, 13, 14

Martinez v. Texas Dept. of Criminal Justice
300 F.3d 567 (5th Cir. 2002) 10

Contents

Page

Matsushita Electric v. Epstein
516 U.S. 367 (1996) 14

Mittenhuber v. City of Redondo Beach
142 Cal.App.3d 1 (1983) 24

San Diego Police Officers Association v. San Diego City Employees' Retirement System
568 F.3d 725 (9th Cir. 2009) 13, 15

Spoklie v. State of Montana
411 F.3d 1051 (9th Cir. 2005) 11, 12

Tilton v. Reclamation District No. 800
142 Cal.App.4th 848 (2006) 18-22

United States v. Dickinson
331 U.S. 745 (1947) 22, 23

Yeti by Molly, Ltd. v. Deckers
259 F.3d 1101 (9th Cir. 2001) 10

Statute Cited:

28 U.S.C. §1738 11

I

PROCEDURAL HISTORY

The petitioners filed their original complaint in the Superior Court of the State of California for the County of Ventura. It contained causes of action for inverse condemnation, trespass, nuisance, dangerous condition of public property, and negligence. A subterranean 18-inch-diameter corrugated metal pipe installed by the original housing tract developer in 1963 traveled the length of the boundary between the two parcels eventually acquired by the petitioners. The pipe began at the curb face of the front of the two homes and emptied out from the face of the steep hillside chasm forming the subject properties' backyards. The County of Ventura, the only defendant, was alleged to have negligently maintained the initial portion of the drainage improvement in the street and for some distance beyond throughout the period of approximately 1963 through the present. The complaint further alleged that the respondent County did not perform any maintenance of the pipe whatsoever.

On January 16, 2007, the superior court granted judgment on the pleadings as to the inverse count in favor of the County of Ventura, with leave to amend. The first amended complaint was filed on February 5, 2007. The respondent was alleged to have refused to do anything whatsoever in repair of the allegedly offending drainpipe, informing the petitioners that because the County had refused formal dedication of the subject drainage easement approximately 40

years earlier, it never had any responsibility to repair the pipe or its damage.

The superior court sustained the County's demurrer to the first amended complaint as to the first cause of action for inverse condemnation. Twenty days' leave to amend was granted.

The second amended complaint was filed on April 16, 2007. It continued the theme that the January 23, 2005, explosion which eroded the backyard hillside of the petitioners' homes was caused by the broken-off and corroded drainpipe dangling over the cliff. The pipe corroded over time and ruptured, which allowed water to seep into the subsurface soil of the petitioners' lands. The metal drainpipe had a life expectancy of 30 years and failed in its 42nd year of use. The resultant seepage of water, continuing over a long period of time, caused the strength of the soil mass underlying the petitioners' premises to fail, resulting in massive landslides.

Respondent County demurred to the inverse count of the second amended complaint on April 26, 2007. The petitioners opposed the demurrer. The court sustained the demurrer to the first cause of action for inverse condemnation without leave to amend on June 15, 2007.

Respondent answered the balance of the second amended complaint on June 21, 2007. Petitioners made a series of motions requesting the court to reverse itself as to the sustaining of the demurrer.

Motions for reconsideration, for leave to amend the complaint, and for leave to file a third amended complaint were made, respectively, on June 28, September 21, and October 4, 2007. Respondent opposed these efforts. The superior court denied the motions.

The case went to trial on the two remaining causes of action for dangerous condition and nuisance in October of 2008. Both sides submitted multiple trial briefs, in limine motions, and jury instructions. Extensive days of pretrial proceedings allowed counsel for both sides to argue these various filings, on October 22, 23, 28, 30, 31, and November 7 and 12, 2008, continuing on January 1, 2, and 6, 2009.

Jury selection began on January 8, 2009. Presentation of opening statements, evidence, closing arguments, and jury instructions continued on January 9, 13, 14, 15, 20, 21, 22, and 23. The jury deliberated during the day of January 27, 2009, and returned its verdict.

The jury determined that the County property, a slightly downsloping street which the County had accepted from the developer at the same time as the County rejected the developer's offer of dedication of the easement in which the offending drainpipe was situated, and a drain between the street and petitioners' private drainpipe, was not in a dangerous condition at the time of the landslide which was the subject matter of the lawsuit. The jury further determined that the County's property

did not create a condition which amounted to a nuisance. Final judgment was entered in respondent' s sole favor, by the Ventura Superior Court, on March 27, 2009.

The petitioners timely appealed to the state court of appeal on June 4, 2009. They filed their opening brief in the court of appeal on December 18, 2009. Respondent filed its brief in the state court of appeal on February 10, 2010. Petitioners filed a reply brief in the court of appeal on March 2, 2010.

Oral argument before the court of appeal occurred on April 14, 2010. The unpublished opinion of the court of appeal was filed on June 23, 2010. It unanimously affirmed the judgment in full in favor of the respondent.

Petitioners filed a rehearing petition in the court of appeal on July 9, 2010. Respondent answered the rehearing petition, pursuant to an order of the court of appeal, on July 19, 2010. Petitioners filed a reply to the answer on July 20, 2010. The petition for rehearing was denied by the court of appeal on July 22, 2010.

Petitioners filed a timely petition for review to the California Supreme Court on August 10, 2010. The Supreme Court considered and denied the petition on September 15, 2010. The remittitur issued, completing the case, on October 5, 2010. This document restored original jurisdiction to the

Ventura Superior Court to enforce the award of costs to respondent contained in the final judgment.

STATEMENT CONTESTING JURISDICTION

Respondent contests the jurisdiction of the federal system. No mention of the Takings Clause, the United States Constitution, or any federal issue was ever raised, briefed, or addressed by the petitioners, by the respondent, or by any judge of the superior court, court of appeal, or state Supreme Court. Having failed to raise this issue below in the state court system, petitioners cannot now raise it for the first time in a certiorari petition.

FACTS RELEVANT TO THE PETITION

Petitioners, plaintiffs in the state court system, decided to purchase two homes perched near the edge of a hillside chasm. The housing tract is located in a mountainside development which has exclusive homes commanding a majestic view of the Pacific Ocean. These view properties are situated in a hilly area, and the natural terrain selected by the developer which built these homes in the early 1960' s has several slightly downsloping streets.

The County of Ventura did not construct anything in the hillside tract. The County did not build the roads or have anything to do with recommending the construction of the housing tract itself.

The Ventura County Board of Supervisors expressly rejected the tract developer' s offer of dedication of the drainage easement in September of 1963. The County of Ventura never wavered from the rejection and never had anything to do with that drainpipe or its easement. The County did not select the drainpipe, nor did it give any advice about the pipe or material for its construction to anyone, the developer or any subsequent landowner. The County of Ventura did not install, service, or maintain the drainpipe or any part of it. The County never made any promises or representations whatsoever about the pipe, the easement, or the stability or safety of the land or homes.

The County of Ventura never built, owned, modified, acquired, operated, or controlled any waterworks or water-bearing facilities adjacent to or upstream from the petitioners' homes. The County did nothing to alter the standard, paved street providing ingress and egress for the petitioners' homes and the homes of other neighbors on that street. The petitioners did not produce any expert witness at trial indicating that there was anything substandard or wrong with the street (the petitioners did some cross-examination of the Public Works Director of the County of Ventura along these lines, but he denied that there was anything substandard about the street or which could have been done differently to avoid channeling water down the street to the petitioners' homes).

Despite petitioners' self-serving characterization of " public water," there is no government source of water whatsoever in, on, or adjacent to the subject street leading to petitioners' homes. By the rhetorical ruse of saying " public water," petitioners are really referring to adventitious water from rain and private irrigation sprinklers.

The County of Ventura did not select the drainpipe or give any advice about the pipe or material for its construction. The County did not install, service, or maintain the drainpipe or any part of it. The County never made any promises or representations about the pipe whatsoever.

To state the proposition in the reverse, the only involvement of respondent was rejecting the original tract developer' s offer of dedication of this and other easements on private property, while accepting the housing tract developer' s offer of dedication of the streets. Thereafter, the County' s only involvement was to resurface the streets when they deteriorated, periodically. Otherwise, the County is not guilty of having any involvement whatsoever with the problem which the petitioners chose to purchase.

Under California law, all theories of liability involving adventitious surface water flow are analyzed under a state Supreme Court decision entitled *Locklin v. City of Lafayette*, 7 Cal.4th 327 (1994). It is true, parenthetically, that a judge of the Ventura Superior Court had dismissed the inverse condemnation cause of action, per se, at an earlier

juncture before trial. The basis of that ruling was that, under various California appellate authorities, there was nothing in the nature of a conscious, deliberate decision or strategy which causally connected to the land failure, and without some conscious governmental decision, there is no analogy to eminent domain, from which the courts have derived inverse condemnation. Therefore, the petitioners did not have the inverse condemnation cause of action during trial, but all that meant was that they could not recover the vast panoply of remedies in California law for a successful inverse condemnation case, such as attorneys' fees, expert fees, and prejudgment interest. The *Locklin* rule gives a water tort plaintiff in California the identical evaluative matrix when suing a municipality for adventitious flow of water over improved hardscape. Therefore, the petitioners did have their inverse theory, in law and in fact, during the trial, even though they would not have been able to recover attorneys' fees, prejudgment interest, and expert witness fees if they had obtained the jury' s verdict.

DOES THE FAILURE OF PETITIONERS (AS WELL AS RESPONDENT AND ANY JUDGE AT THE THREE LEVELS OF THE STATE COURT SYSTEM) TO MENTION THE EXISTENCE OF ANY FEDERAL OR FEDERAL CONSTITUTIONAL PROVISIONS PRECLUDE THEM FROM RAISING SUCH AN ISSUE FOR THE FIRST TIME IN A FEDERAL APPEAL?

The petitioners never included any mention whatsoever of an issue relating to federal law, the Takings Clause, the Fifth Amendment, or the United States Constitution in any of the state court proceedings. There was no mention of such issues in any of the three versions of the complaint; in any brief filed in the state superior court; in the opening, reply, or reconsideration briefs filed in the state court of appeal; or in the petition for review to the California Supreme Court. Nor were any of these issues mentioned by respondent or by any judge of any court at any of the three levels of the state court system.

There was nothing to have prevented the petitioners from having included a cause of action for a Fifth Amendment taking in any of the versions of their complaint in the state superior court. This Court has held that a state court's refusal to entertain federal claims against municipalities, when the state court system entertains similar state-law actions, violates the Supremacy Clause. *Howlett v. Rose*, 496 U.S. 356 (1990). The state court never prohibited petitioners from asserting a Fifth

Amendment taking or any federal constitutional claim; indeed, petitioners never presented any such claim in the state court system.

Each of the following federal appellate precedents holds that issues raised for the first time on appeal cannot be considered because they have been waived: *Connecticut General v. New Images*, 321 F.3d 878, 882 (9th Cir. 2003); *Yeti by Molly, Ltd. v. Deckers*, 259 F.3d 1101, 1108 (9th Cir. 2001); *Doi v. Halekulani*, 276 F.3d 1131, 1140 (9th Cir. 2002); *In re America West*, 217 F.3d 1161, 1165 (9th Cir. 2000); *Martinez v. Texas Dept. of Criminal Justice*, 300 F.3d 567, 574 (5th Cir. 2002).

DOES RES JUDICATA, COLLATERAL ESTOPPEL, OR ANY DOCTRINE OF FORMER ADJUDICATION BAR RELITIGATION OF PETITIONERS' CLAIMS, WHICH WERE THOROUGHLY PRESENTED TO AND REJECTED BY A STATE SUPERIOR COURT JURY DURING EIGHT DAYS OF TRIAL IN JANUARY OF 2009; CONFIRMED BY THE TRIAL COURT JUDGE; UNANIMOUSLY AFFIRMED IN FULL BY THE STATE COURT OF APPEAL, WHICH ALSO DENIED PETITIONERS' RECONSIDERATION PETITION; AND WHICH THE CALIFORNIA SUPREME COURT DECLINED TO DISTURB?

Res judicata constitutes an affirmative defense. The application of this doctrine to bar relitigation of a matter already decided derives from the full faith

and credit statute, 28 U.S.C. §1738. That statute requires federal courts to accord a state court judgment the same preclusive effect which it would have in state court. *Long v. Shorebank Development*, 182 F.3d 548, 560 (7th Cir. 1999).

When the state court judgment would not preclude further litigation in the state court of an issue which turns out to be important to a federal claim, the federal court may proceed. Otherwise not. *Marrese v. American Academy*, 470 U.S. 373, 381 (1985); *accord*, *Long v. Shorebank*, 182 F.3d at 560.

If a final judgment has been entered in a plaintiff' s state court lawsuit, dismissing the suit in its entirety, it is appropriate to determine the preclusive effect of the state court judgment. *Spoklie v. State of Montana*, 411 F.3d 1051, 1055-56 (9th Cir. 2005), overruled by implication on another point in *Lingle v. Chevron*, 544 U.S. 528 (2005). In ascertaining the preclusive effect of a state court final judgment, the federal court applies the law of the state which issued the judgment. *Id.*

The final judgment of a trial court is entitled to preclusive effect. *Spoklie*, 411 F.3d at 1056. Under Montana preclusion law, for example, a claim litigated in a former action and claims which might have been litigated in that action are barred. *Id.*

A resolved claim will be res judicata (under Montana law) as to subsequent claims if four circumstances concur. The parties must be the same. The

subject matter must be the same. The issues must be the same —that is, relating to the same subject matter. Finally, the capacities of the persons must be the same in reference to the subject matter and issues to be resolved. *Spoklie*, 411 F.3d at 1056. The *Spoklie* court stated, " All four requirements are easily met here." *Id*.

The issue again arose in the case of *Brodheim v. Cry*, 584 F.3d 1262 (9th Cir. 2009). The *Brodheim* court held:

> Under 28 U.S.C. §1738, federal courts are required to give state court judgments the preclusive effects they would be given by another court of that state. *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 84 . . . (1984); *Maldonado v. Harris*, 370 F.3d 945, 951 (9th Cir. 2004).

Brodheim, 584 F.3d at 1268.

The *Brodheim* court reversed a finding by the district court because it applied the standard used to analyze the preclusive effect of prior federal court judgments, not prior state court judgments. California law holds that a final judgment of a state court precludes further proceedings when they are based upon the same cause of action. 584 F.3d at 1268. Unlike the federal courts, which apply a transactional nucleus of facts test, California courts employ the primary rights theory to determine what

constitutes the same cause of action for claim-preclusion purposes. *Id.*

Under California law, a cause of action is a primary right possessed by a plaintiff, a corresponding primary duty devolving upon the defendant, and a harm done by the defendant which consists of a breach of such primary right and duty. *City of Martinez v. Texaco Trading*, 353 F.3d 758, 762 (9th Cir. 2003), citing *Citizens for Open Access, etc. v. Seadrift*, 60 Cal.App.4th 1053, 1065 (1998), *accord*, *Brodheim*, 584 F.3d at 1268. If two actions involve the same injury to the plaintiff and the same wrong by the defendant, then the same primary right is at stake, even if in the second suit the plaintiff pleads different theories of recovery, seeks different forms of relief, and/or adds new facts supporting recovery. *Eichman v. Fotomat*, 147 Cal.App.3d 1170, 1174 (1983); *accord*, *San Diego Police Officers Association v. San Diego City Employees' Retirement System*, 568 F.3d 725, 734 (9th Cir. 2009); *accord*, *Brodheim*, 584 F.3d at 1268.

This Court, in the *Marrese* decision, 470 U.S. at 380, explained that 28 U.S.C. §1738 directs a federal court to refer to the preclusion law of the state in which the judgment was rendered. It has long been established that §1738 does not allow federal courts to employ their own rules of res judicata in determining the effect of state judgments. Rather, it goes beyond the common law and commands federal courts to accept the rules chosen by the state from which the judgment is taken. *Id.*

The *Marrese* decision explains that §1738 embodies concerns of comity and federalism which allow the states to determine the preclusive effect of judgments in their own courts. Such determination is limited by the fundamental fairness provision of substantive due process.

In *Matsushita Electric v. Epstein*, 516 U.S. 367, 375 (1996), this Court held that when faced with a state court judgment relating to an exclusively federal claim, a federal court would first look to the law of the rendering state to ascertain the effect of the judgment. If state law indicates that the particular claim or issue would be barred from litigation in a court of the same state, then the federal court would next decide whether, as an exception to §1738, it should refuse to give preclusive effect to the state court judgment. But in the absence of federal law modifying the operation of §1738, the preclusive effect in federal court of a state court judgment is determined by state law. *Matsushita*, 516 U.S. at 375.

The petitioners litigated the living daylights out of every conceivable issue in the subject litigation. In the state court action, multiple versions of the complaint were filed. There was a full and comprehensive jury trial, with multiple days of pretrial and trial proceedings, a verdict, and then a full-blown direct appeal to the state court of appeal. Petitioners filed three comprehensive briefs in the court of appeal, and there was full legal argument, along with an unpublished opinion.

The wrong said to have been done by respondent was the same as raised in the certiorari petition. This was the claimed responsibility of a local government for an accepted dedication of slightly downsloping streets which channel adventitious water runoff into a wholly privately owned subterranean pipe which straddles the boundary line of two parcels of private property. The issues of whose responsibility it was to know of and maintain the private pipe were litigated extensively.

The damage claimed —the hillside blowout in the petitioners' backyard chasm —was the same. That hillside blowout in January of 2005 caused by the corroded pipe, causing substantial recession of the backyard hillsides of the two parcels of realty, was the damage claimed in the state court suit and now in this federal certiorari petition.

The two actions — the concluded state court litigation and this certiorari petition — therefore involve the same injury to the same petitioners and the same wrong said to have been committed by the same defendant. The same primary right is at stake, even though this subsequent suit has the petitioners pleading different theories of relief (under the federal Constitution). The subsequent action, this certiorari petition, is blocked by principles of former adjudication, especially res judicata. *Brodheim*, 584 F.3d at 1268; *Eichman*, 147 Cal.App.3d at 1174; *San Diego Police Officers Association*, 568 F.3d at 734.

Plaintiffs dissatisfied with the legal and factual rulings in their own state cannot pick up a certiorari petition and use it as a cudgel to relitigate the matter from scratch. *Kremer v. Chemical Construction*, 456 U.S. 461, 466-467 (1982). The *Kremer* court stated that §1738 requires a federal court to look first to state preclusion law in determining the preclusive effects of a state court judgment. The Court' s analysis in *Kremer* began with the finding that state law would, in fact, bar relitigation of the discrimination issue decided in earlier state proceedings. 456 U.S. at 466-467. That finding implied that the plaintiff could not relitigate the same issue in federal court, unless some exception to §1738 applied.

Kremer observed that an exception to §1738 will not be recognized unless a later statute contains an express or implied repeal. In that case, the Supreme Court held that Title VII does not expressly repeal §1738, so the Court concluded that the statutory provisions and legislative history did not support a finding of implicit repeal. *Kremer* concluded that its holding applied to a lawsuit involving a claim within the exclusive jurisdiction of the federal courts. 470 U.S. at 381.

IF THIS COURT WERE TO REACH THE TAKINGS CLAIMS RAISED FOR THE FIRST TIME IN THE PENDING CERTIORARI PETITION, WOULD FEDERAL LAW CONSTRUING THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT DIFFER FROM CALIFORNIA LAW OF INVERSE CONDEMNATION, WHICH REQUIRES SOME CONSCIOUS OR DELIBERATE GOVERNMENT DECISION CAUSALLY CONNECTED TO THE LAND FAILURE, IN ORDER TO APPROXIMATE EMINENT DOMAIN?

California law requires something akin to a conscious thought process indicating a reasoned intent to acquire private property or, analogously, recognizing the potential for the governmental decision to acquire private property. A conscious decision-making process causally connected to the governmental destruction of private property substitutes for the deliberate seizure of private property involved in eminent domain, so that inverse condemnation is the " inverse" of eminent domain because there is a deliberate governmental decision to do or refrain from doing something which is proximately connected to the destruction of private property.

This requirement of a deliberate governmental act to undertake a particular plan or manner of maintenance is the *sine qua non* of an inverse condemnation cause of action. The leading modern authority on this topic is the California Court of

Appeal' s decision in *Tilton v. Reclamation District No. 800*, 142 Cal.App.4th 848, 853-859 (2006). In *Tilton*, heavily relied upon in respondent' s demurrer sustained without leave to the inverse condemnation cause of action, the unanimous appellate court held that the government' s demurrer was properly sustained to the plaintiffs' two taking causes of action. The *Tilton* court agreed with the trial court that these causes of action failed to state a claim either in inverse condemnation or for a taking of private property for a public use. 142 Cal.App.4th at 854.

The *Tilton* plaintiffs attempted to set forth causes of action for inverse condemnation and alleged violation of the federal civil rights statute, 42 U.S.C. §1983. The trial court had sustained the defendant government' s demurrers, without leave to amend, to both of those causes of action.

The *Tilton* court agreed with the trial court that these causes of action failed to state a claim either in inverse condemnation or for the taking of private property for a public use. 142 Cal.App.4th at 854. The *Tilton* decision stated that the California Supreme Court had twice taken pains to carefully limit the principle of inverse condemnation by stating, " Damage resulting from negligence in the routine operation having no relation to the function of the project as conceived is not within the scope of the rule applied in the present case." *Id.* at 855. A collection of debris and stumps in a storm drainage ditch constructed by the defendant county in one of

those two cases allegedly raised an obstruction which caused water to back up onto the plaintiffs' land; the state Supreme Court held that if this blockage was due to mere negligent operation of the ditch system, it was not within the scope of liability as a taking or damaging for public use. *Id.*

At 142 Cal.App.4th 855-856, the *Tilton* court turned to a discussion of an appellate decision which the court characterized as being perhaps the closest case to the issue at hand. In that case, the plaintiffs' greenhouse and plant-growing suffered substantial damage when the levee maintained by the defendant flood control district along a creek suffered a 60-foot break. The plaintiffs notified the defendant district of the break and of the threat of damage, but no repairs were made, with the result that water and debris carried by the water damaged the plaintiffs' property on two occasions thereafter.

In that earlier case, the plaintiffs sued for inverse condemnation and negligence. The appellate court held that the defendant district had no liability to plaintiffs under a theory of inverse condemnation. Problems which arise when a public agency " is carrying out a deliberate plan with regard to the construction of public works" are inversely compensable, whereas without that indispensable element of the cause of action, damage is not inversely compensable. An example of the type of activity for which a government is not inversely liable is acts of carelessness or neglect on the part of a public agency.

The *Tilton* court next discussed another case in which the plaintiff' s land was damaged by flooding from overflows of a creek. Those overflows resulted from heavy rains which caused a reservoir to fill up quickly and transmit a large volume of water down a spillway into the creek and then onto the plaintiff' s property. Rejecting the application of a taking, the earlier appellate court held that this damage from the routine operation of a water-bearing facility, having no relation to the function of the project as conceived, was not a taking for public use " and thus not a basis for inverse condemnation." 142 Cal.App.4th at 856.

The *Tilton* opinion next turned to a discussion of the *Arreola* decision. 142 Cal.App.4th at 857. The key distinction separating out inverse liability, according to the *Tilton* decision at 857, is whether the defendant government designed, constructed, and was thereafter charged with implementing a deliberate plan. According to the *Tilton* court' s interpretation of the *Arreola* decision, a public entity' s maintenance of a public improvement would constitute constitutionally required government use only if it was the entity' s deliberate act to undertake the particular plan or specified manner of maintenance. *Tilton* stated, " The necessary finding is that the wrongful act be part of the deliberate design, construction, or maintenance of the public improvement." *Id.*

The fundamental justification for inverse liability is that the government, acting in furtherance of

governmental objectives, takes "a calculated risk that private property may be damaged. . . . That is why simple negligence cannot support the constitutional claim." 142 Cal.App.4th at 857.

The *Tilton* decision stated that the *Arreola* court keyed inverse liability to the adoption of "a deliberate plan with regard to the construction of public works." *Id.* at 858. The public entity must have "made the deliberate calculated decision to proceed with a course of conduct, in spite of a known risk." *Id.*, interpreting *Arreola*. *Tilton* further tracked the *Arreola* opinion by stating that in order to prove the type of governmental conduct which will support liability in inverse condemnation, the plaintiff must show that the public entity "was aware of the risk posed by its public improvement and deliberately chose a course of action —or inaction —in the face of that known risk." *Id.*, citing *Arreola*.

Tilton next turned to an appellate decision published in 2003. In that case, the appellate court concluded that the plaintiff's land damage was directly caused by a government plan which benefitted all of California by saving billions of tax dollars. But it also resulted in the failure of a certain levee, which caused plaintiff's land to be inundated. In that earlier case, a basic part of the government's plan was to control periodic flooding by accepting existing levees as much as possible in order to reduce the cost of an extensive, coordinated flood control system. The state government never tested that particular levee or reviewed any records of its

construction in order to determine if it really was as strong as the global plans which it deliberately adopted assumed. The state government itself even ignored specific warnings about the levee's weakness. 142 Cal.App.4th at 858.

The *Tilton* court distilled the legal principle that in order to be liable for inverse condemnation or taking, there must be "a flawed plan . . . and/or flawed construction." *Id.* The converse of that requisite element of inverse condemnation is that "there is no such liability where similar failures are the result of negligent or inadequate operation and maintenance." *Id.* The crucial aspect of inverse liability in unwanted-water cases is the distinction that the problem must have been "integrally connected to an overall plan." *Id.* Earlier appellate decisions suggesting that inverse condemnation takings were pure strict liability are "now of questionable value" since the Supreme Court has twice suggested that those decisions relied upon an incorrect automatic liability test. *Id.*

The decision relied upon in the certiorari petition, at pages 8 and 9, *United States v. Dickinson*, 331 U.S. 745 (1947), clearly involved a significant set of deliberate decisions implemented by the federal government. In *Dickinson*, the federal government deliberately altered the course of a river. The government chose to modify the course of the river as part of its strategic plan to raise a river's level.

Dickinson unmistakably concerned deliberate conscious choices by the government designed to improve the navigability of a river in West Virginia. The concept was to build a dam. This strategy was certainly a conceived plan.

The water above the dam was to be impounded in order to deepen the channel to raise the river level in that area. The government project succeeded by raising the river, in successive stages, a total of 11 feet. The new height of the river flooded the plaintiff' s land.

While the government in *Dickinson* did not directly condemn the land in traditional eminent domain proceedings, it made a conscious choice, embodied in a series of deliberate decisions, which ruined the plaintiff' s property. But in the present case, the subject of the certiorari petition, no version of the complaint nor a shred of evidence produced or offered during eight days of trial evinced any conscious decision, deliberate action, or strategic plan undertaken by the respondent government, the County of Ventura. The present case was never anything except a county' s long-ago acceptance of a privately built road serving as ingress and egress for a residential housing tract.

CAN A LOCAL GOVERNMENT BE STRICTLY LIABLE FOR THE UNALTERED TOPOGRAPHICAL TERRAIN, IN THIS CASE INVOLVING A SLIGHTLY DOWNSLOPING STREET IN A RESIDENTIAL HOUSING TRACT?

As the California Court of Appeal rightly recognized in *Mittenhuber v. City of Redondo Beach*, 142 Cal.App.3d 1 (1983), governments cannot be liable for the topography and natural terrain of property. The *Mittenhuber* court explained:

> The mere fact that a road slopes downhill does not mean that it is dangerous. To hold the defendant liable for the natural topography of the land would be to impose strict liability on the defendant as an insurer of the safety of its streets. The City would be required to either grade all of its streets level in hilly areas or to forego development in such areas. An ordinary, natural topographical condition is not a dangerous condition of property within the meaning of the governmental tort liability law. It is such, and requires a warning sign, only when it constitutes a deceptive condition or trap for even those who use the property with due care. [Citations omitted.] Highways are normally adapted to the natural geographic feature of the lay of the land.

142 Cal.App.3d at 7.

The rule of strict liability urged by the certiorari petition would make every government in California which accepted an offer of dedication of slightly downsloping streets strictly liable. This would be massively counterproductive, because governments would simply reject all such offers of dedication, fearing the large-scale and uninsurable risks which attended acceptance of such offers. The result would be private responsibility to maintain roadways. Private landowners would not have the technology or funds available to seal, resurface, and clear streets. There would be no ingress into or egress from housing tracts, as roads deteriorated with the passage of time after the developer initially constructed them. The rule of reasonableness selected in California makes tremendous sense because it judges governments fairly, factoring into the evaluative matrix whether the problem was caused by the plaintiff homeowners themselves, as it was in this case (please refer to next heading).

IS PETITIONERS' ATTACK UPON THE CALIFORNIA SUPREME COURT DECISION IMPLEMENTING A RULE OF REASONABLENESS FOR THE EVALUATION OF SURFACE WATER DRAINAGE CLAIMS AGAINST MUNICIPALITIES, WHICH ALLOWS CONSIDERATION OF MISCONDUCT OF THE PLAINTIFF LANDOWNERS, INCONSISTENT WITH THE UNITED STATES CONSTITUTION?

The present litigation went to trial on two theories, dangerous condition of public property and

nuisance. The most relevant appellate authority governing disposition of water torts, both inverse and non-inverse, where the fact pattern involves hardscape increasing the volume, flow, and direction of adventitious water, is the California Supreme Court' s decision in *Locklin v. City of Lafayette*, *supra*, 7 Cal.4th 327. A separate body of California law, which is in the nature of strict liability, governs rupture or malfunction of government water-bearing facilities, such as pipes, sewers, reservoirs, and dams. But for cases such as the present one, where the fault is said to rest with hardscape improvements, the most relevant appellate decision is *Locklin*.

The Supreme Court observed in *Locklin*:

> This is not to say that public entities incur absolute liability for any damage caused by the runoff of surface water from improvements on its property into a natural watercourse or from public improvements constructed in or on a watercourse. . . . [T]he public agency is liable only if its conduct posed an unreasonable risk of harm to the plaintiffs, and that unreasonable conduct is a substantial cause of the damage to plaintiff' s property. The rule of strict liability generally followed in inverse condemnation [citation] is not applicable in this context.
>
> Because a public agency, like any riparian property owner, engages in a

> privileged activity when it drains surface water into a natural watercourse or makes alterations to the watercourse, article I, section 19 of the California Constitution mandates compensation only if the agency exceeds the privilege by acting unreasonably with regard to other riparian owners.

7 Cal.4th at 367.

The *Locklin* holding extends to non-inverse torts as well:

> Therefore, while the Court of Appeal did not refer to the nuisance and trespass causes of action, it did not err in affirming the judgment for County and District. Giving plaintiffs' evidence all the weight to which it is entitled, and drawing all legitimate inferences favorable to plaintiffs from that evidence, it is not sufficiently substantial to support a verdict for plaintiffs on those causes of action. [Citation.] . . . ¶ Finally, we note with regard to both tort and inverse condemnation liability that the evidence reflects no efforts by plaintiffs themselves to protect their properties . . . .

7 Cal.4th at 373-374.

The *Locklin* court affirmed judgment as a matter of law in favor of the municipal defendants. The plaintiffs did not establish that the defendants acted

unreasonably in the construction of improvements or alteration of the method of discharge of the runoff. Nor did plaintiffs establish that they themselves acted reasonably to protect their properties from water-caused damage. 7 Cal.4th at 361. The California Supreme Court stated, " [B]ecause strict liability would discourage construction of needed public improvements which affect surface water drainage, liability exists only if the agency acts unreasonably, with reasonableness determined by balancing the public benefit and private damage in each case." *Id.* at 368.

The trial court in the instant matter charged the jury with the multiple *Locklin* reasonableness factors identified at 7 Cal.4th 368-369. The *Locklin* factors governing both inverse and non-inverse water torts were set forth in Jury Instruction No. 20. The *Locklin* reasonableness factors include the overall public purpose being served by the improvement, the degree to which plaintiffs benefitted by those improvements, the availability to the public entity of feasible alternatives with lower risks, and plaintiffs' obligation to take reasonable steps in defense and protection of their own property. In this context, the *Locklin* court wrote, " Reasonableness in this context also considers the historic responsibility of riparian owners to protect their property from damage caused by the stream flow and to anticipate upstream development that may increase that flow." 7 Cal.4th at 369. The *Locklin* court placed the burden of proof of demonstrating unreasonableness upon the plaintiffs. *Id.* *Locklin* held that the water tort

plaintiff must carry a burden of demonstrating that he undertook reasonable measures in defense of his own property and, failing such proof, cannot recover. *Id.* at 372-373.

The first two *Locklin* factors weigh only in the government' s favor. Petitioners and their neighbors absolutely needed to drive vehicles on Otero Court in order to access their residences. That was the overall public purpose being served by the first of the two public improvements —the street (Otero Court). The degree to which petitioners and all of their neighbors benefitted by the ability to drive vehicles on well-maintained, paved streets to go to and from their homes is inestimable.

The other public improvement was the drain connecting the street with petitioners' private pipe. The drain was a great benefit to petitioners. Without it, water coursing down Otero Court would have overtopped the curb, flowing directly onto and inundating the petitioners' front yards. The soil would soon have been compromised by saturation, failing decades sooner.

The drain solved all problems; it did not create any. If petitioners had but been vigilant landowners and hired a piping contractor to check the integrity of the developer' s drainpipe straddling their privately owned easement, all would have turned out differently. The piping contractor would have replaced or sleeved the old corrosion-prone metal pipe with a modern, space age, rustproof pipe. Petitioners did do

this after the hillside explosion, but they should have done it before.

Petitioners chose to purchase property located at the bottom of a road which sloped downhill. Any prospective purchaser would instantly observe that the street would channel adventitious water from private irrigation and rain downhill toward the land which they were contemplating acquiring. Likewise, any untrained person would easily see that there was an 18-inch-diameter pipe entrance in the curb face of the front of their property. Such a purchaser would reasonably check the deed or determine who owned the subterranean pipe straddling the boundary line. Ascertaining that the drainpipe belonged to them, they would (a) not buy the homes, or (b) hire a piping contractor.

After the hillside blowout, the petitioners engaged a piping contractor named Howard Janotta to sleeve their drainpipe with a smaller-diameter pipe constructed of non-corrosive space age material, polyvinylchloride. Had they simply thought to engage Mr. Janotta' s services before their hillside blew out, they could have averted or at least delayed the land damage for a good long while. It is not the government' s fault that successive homeowners simply neglected their responsibility to periodically ascertain the integrity of an outmoded piece of period technology.

The petitioners could have gone far toward establishing their *Locklin* burden by introducing the

testimony of a civil engineer that there were other (or at least another) methods of draining or diverting adventitious (non-governmental) water in a relatively inexpensive and technologically feasible way. The petitioners chose not to call upon such an expert. Instead, they conducted theretofore undeveloped ad hoc trial examination of that nature with respondent' s knowledgeable client representative, Transportation Director Butch Britt. Mr. Britt testified that there were no feasible alternatives, besides the Otero Street drain itself.

The street drain itself greatly assisted the petitioners by long delaying the land damage to their property. The County-owned drain inlet connected the street and the pipe. The drain inlet actually aided the petitioners' situation dramatically. Without it, adventitious water flowing down Otero Court would have overtopped the curb and inundated the front of petitioners' properties. Therefore, the County property helped, rather than disserved, the stability of the land by channeling the water safely for decades into the pipe. It is not the government' s fault that these private landowners did not see that water was flowing down their street into the drain inlet and take measures, such as retaining a piping contractor, to find out where that water was going and if it is was corroding or rusting a pipe. Having a massive investment like a multi-million-dollar home would be sufficient impetus for a reasonable person to ask where all that water flowing down the street was going and then, seeing it enter the 18-inch-diameter hole in their curb face, retain a piping contractor to

determine whether the pipe connected to that hole was in need of sleeving or replacement.

It makes all the sense in the world to place a reasonable burden like sleeving a pipe upon the people who benefit by the ownership of the home — petitioners. The two couples paid Mr. Janotta the comparatively small sum of $5,972.50 (split between the two husband-and-wife homeowners) to insert and anchor a polyvinylchloride flexible pipe into the interior of the existing rusted pipe. The new pipe was rust resistant and ran the entire length of the existing corrugated metal drain pipe. The PVC pipe was quite effective in safely channeling water from the street down into the gully behind the petitioners' properties. It was petitioner Barrett's idea to contact Mr. Janotta and instruct him to sleeve the existing corrugated metal pipe with a pipe comprised of modern material. No evidence was offered during trial of any inability to have completed this same process, pre-landslide.

Petitioner Patty Chan testified that she was well aware of the drain inlet in the curb face almost from the inception of their acquisition of the property. She periodically saw water entering the drain inlet. She thought she knew of the drain inlet as early as 2001. She characterized her failure to realize that the drain inlet must be connected to a subterranean pipe running the length of her boundary line as "stupid" and "dumb."

Rather than foisting upon the already massively overburdened taxpayers the cost of inspecting, servicing, and replacing drainpipes below ground on private property, whose dedication the government expressly rejected, it makes vastly more sense to ask private property owners to take reasonable precautions in defense of their own property. There is nothing hidden here. All of the petitioners could see that the street flowed downhill. All could see rain and private irrigation water running down the street into an 18-inch opening in the front of their properties through a symmetrical hole in the curb face. They could see that the water disappeared. They knew that they bought expensive homes precariously perched on the edge of a gorge. They knew that there was not too much land comprising their backyards and that they could ill afford to have it deteriorate. It would have made all the sense in the world to simply have retained a piping expert to do some preventive study and maintenance, rather than losing their homes and then blaming the government for it.

THERE ARE MULTIPLE MISSTATEMENTS OF THE RECORD IN THE CERTIORARI PETITION

On page 16 of the certiorari petition, it is stated that " County admittedly used said private land and pipe for County public street drainage . . . ." This is either a misstatement or a rhetorical ruse. The term " public" in the quoted phrase is definitely not synonymous with " government." If " public" means

that water from the sky, in the form of rain, and private irrigation water from the sprinklers and hoses of the neighbors on that street, Otero Court, flowed down the street toward petitioners' homes, then yes, it is admitted that "public" water flowed down the street. If "public" means rainwater and private irrigation water, then the statement is largely true, but if it means, or is intended to mean, water from some nonexistent government facility, then it is false.

At no time did the respondent ever admit "using" private land or the private pipe for any County drainage. This unsourced admission is typical of periodic, unsourced misstatements attributing an admission of fault to the respondent which simply never occurred. The respondent in this case never admitted using the private land for government street drainage. Petitioners never adduced any evidence whatsoever of a government plan or any government decision to utilize the street for any drainage purpose. It is true that the street does slope slightly downhill and does drain rainwater and private irrigation water toward petitioners' properties. But the one and only government action was accepting dedication of a developer's offer of a set of streets comprising a housing tract so that the members of the public who live there would have well-serviced roads to drive to and from their residences.

Page 17 of the petition states that the County has obstructed mitigation efforts. That is not true.

Petitioners threatened to block the drain inlet. The evidence at trial was that blocking the drain inlet would have caused massive pooling of water at the bottom of the street, making the cul-de-sac at the bottom of Otero Court a lake. This lake effect would cause cars, bicyclists, and pedestrians to slip, slide, and injure themselves and others, which would create a dangerous condition on County property, the road. It would also create more damage to the homes by causing the water to overtop the curb, thus inundating the front of the properties themselves. Therefore, the County Director of Public Works told the petitioners that if they blocked the drain, they would be creating a dangerous condition of public property on the street, via the lake effect, exposing the County and themselves to lawsuits by injured motorists, bicyclists, and pedestrians. The County Public Works Director informed the petitioners that he would probably take action, via the court system, to unblock the drain inlet, should petitioners choose to proceed with their threat.

Page 17 of the certiorari petition claims that the County knew that the public street drainage system would trigger the destabilization of the subject properties. This is an unsourced reference and completely untrue. There was no allegation or any evidence that the County knew, or even suspected, that the properties would be in danger of destabilization.

There was no evidence whatsoever, during trial or otherwise in this litigation, that the government

was using the street as part of any "drainage system." This is pure untrue rhetoric to say that there was some drainage system which had government knowledge or imprimatur. Petitioners cleverly use the rhetoric of a "public street drainage" to make it sound as though there were some government plan or decision to implement a drainage system when in fact there was none whatsoever. It is true that this was a public street and that there was drainage down the street, but utilization of the phrase "public street drainage," suggesting some government plan or conscious choice, is pure sophistry. There was no government plan or system whatsoever.

This straw man of a "public street drainage system" is repeated on page 17 of the petition and elsewhere in the petition. There is no evidence in this case of any government street drainage system. It is simply a public street which drains water down the natural slope of the street into the drainpipe underlying petitioners' properties —nothing more.

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: January 13, 2011

Respectfully submitted,

ALAN E. WISOTSKY
JEFFREY HELD
LAW OFFICES OF ALAN E. WISOTSKY
300 Esplanade Drive, Suite 1500
Oxnard, California 93036
(805) 278-0920
lawyers@wisotskylaw.com

Attorneys for Respondent

No. 10-789

FILED
JAN 24 2011

IN THE

Supreme Court of the United States

PATRICK SHAWN BARRETT *et al.*,

Petitioners,

v.

COUNTY OF VENTURA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

RICHARD L MOOMAU
MOOMAU & ASSOCIATES
300 Esplanade Drive
Suite 900
Oxnard, CA 93036
(805) 981-3979

MARK ALAN PAPAY
Counsel of Record
LAW OFFICE OF MARK ALAN PAPAY
300 E Esplanade Drive
Suite 900
Oxnard, CA 93036
(805) 981-3911
mark@landzoninglaw.com

Attorneys for Petitioners

234452

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CITED AUTHORITIES ii

I. INTRODUCTION 1

II. ARGUMENT 1

A.) JURISDICTION 1

B.) RES JUDICATA & COLLATERAL ESTOPPEL 3

C.) CALIFORNIA LAW vs. FEDERAL LAW 4

D.) "UNALTERED TOPOGRAPHICAL TERRAIN" 4

E.) THE EFFECT OF REASONABLENESS 5

III. ADDITIONAL RESPONDENT MISSTATEMENTS 6

IV. CONCLUSION 10

TABLE OF CITED AUTHORITIES

Page

CASES

Albers v. County of Los Angeles,
(1965) 62 Cal.2d 250 ..... 4, 9

Locklin v. City of Lafayette,
(1994) 7 Cal.4th 327..... 5, 9

MuMin v. Virginia,
(1991) 500 U.S. 415 3

Skoumbas v. City of Orinda,
(2008) 165 Cal.App.4th at 783 5

Tilton v. Reclamation District,
(2006) 142 Cal.App.4th 848..... 4

STATUTES

28 U.S.C.S. §1257(a) 3

I. INTRODUCTION

The plaintiffs have petitioned the Supreme Court for a Writ of Certiorari to the California Second District Court of Appeal (hereinafter "petition"), regarding said appellate rulings, including two "questions presented" and a secondary appellate error. The petitioners here raised specific arguments based on the rulings of the Court of Appeal. The respondents, however, almost completely fail to address *these specific arguments* - and instead present what is thus a largely irrelevant list of "respondent questions presented" replete with misstatements, that largely relate to the lower tort trial rather than the rulings by the appellate court.

II. ARGUMENT

Following are replies to the five "questions presented" by *respondents*, in the order presented by them.

A.) JURISDICTION.

The respondents first raise the question of Supreme Court jurisdiction over this matter. The respondents argue by misstatement, that the petitioners failed to mention the existence of any federal constitutional provisions or issues at any level.

Most fundamentally, inverse condemnation is a federal constitutional provision and issue under eminent domain, and inverse condemnation was alleged and the issue of the underlying demurrer from which the appeal was made, and was argued at length at every level. The issue of inverse condemnation and the demurrer to it, is

the basis of the bulk of the petition. Second, the United States Constitution was specifically alleged as a basis for the action in inverse condemnation in the operative second-amended complaint. Third, the United States Constitution was argued in the petition for review to the California Supreme Court, as follows: "Moreover, if a public entity were to be allowed to damage land without compensating the aggrieved landowner, merely because he unsuccessfully offered the land for dedication, this would constitute an unlawful 'taking' in violation of the Fifth and Fourteenth Amendments of the United States Constitution ..." and "Such an important constitutional right cannot be lost as a result of an unsuccessful offer to dedicate land by a previous owner". *Petition for Review to the Supreme Court of California, pp. 7-8.* Fourth, in the third brief accepted by the Second District Court of Appeal, the petitioners argued "...[M]ay a government, under our United States and California Constitutions, be given carte blanche power to cause the destruction of their land, and even ultimately their homes and other improvements - with no compensation, merely because a previous owner once offered a pipe and its related 7 ½ ft. width per parcel of use easement for County dedication, and the entity then rejected the offer?" *Appellants Petition for Rehearing,* p. 24

More importantly, U.S. Supreme Court jurisdictional standards are established by Federal law, as follows: "Final judgments or decrees rendered by the highest court of a State in such a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where ... any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statues of, or any commission held or authority exercised under, the

United States" *28 U.S.C.S. §1257(a)* Here the respondents claim rights under the United States Constitution itself in eminent domain/inverse condemnation, due process and equal protection, and authority exercised under the United States as outlined, cited and argued at length in the petition. The issue of inverse condemnation, a federal as well as a state issue, has always been at the core of lower appeals and briefings.

Moreover, the United States Supreme Court "may intervene only to correct wrongs of constitutional dimension" and the Court's authority under section 1257 "is limited to enforcing the commands of the United States Constitution". *MuMin v. Virginia*, (1991) 500 U.S. 415, 422. Here, regarding the "wrongs of constitutional dimension" alleged *secondarily* in footnote 1 of the petition, the petitioners as U.S. Citizens, claim a violation of due process and equal protection provisions of the U.S. Constitution, *resulting from the appellate court ruling itself*, from which this petition is made. The same Due Process argument was previously made in briefing to the California Supreme Court.

B.) RES JUDICATA & COLLATERAL ESTOPPEL.

It is obvious that res judicata and collateral estoppel re: the subject trial court judgment or lower appellate rulings have no effect relative to review of such lower rulings by the United States Supreme Court. These doctrines can only bar the re-litigation of causes of action or issues at the trial court level. Under the respondent's argument, the Supreme Court would hold no power at all in the review of any lower court decisions.

C.) CALIFORNIA LAW vs. FEDERAL LAW.

It is again obvious, under the Supremacy Clause of the U.S. Constitution, that the U.S. Constitution and Federal Law are supreme in authority over any State Constitution or laws. Moreover, the respondents misstate the law of California, wherein the Supreme Court of California established strict liability in inverse condemnation damaging cases, as cited and quoted in the petition. *Albers v. County of Los Angeles* (1965) 62 Cal.2d 250, 263. The respondents also rely on a California appellate case, *Tilton v. Reclamation District* (2006)142 Cal.App.4th 848, whose river/levee facts bear no relationship to the non-riparian facts here. See similar arguments re: *Locklin*, infra (see II (E), below).

D.) "UNALTERED TOPOGRAPHICAL TERRAIN"

First, the respondents argue based upon a glaring misstatement of facts. The subject tract development which was constructed with *significant engineered regrading* of a *formerly* natural site, including leveled building pads, paved streets, curbs, gutters, drain inlets and pipes, as shown in the respondent's engineering plans, is far from "unaltered topographical terrain", and is actually *extensively altered* topographical terrain.

Second, this argument is irrelevant. Under the constitution, if a government takes or damages private land for a public purpose, they are liable in inverse condemnation, regardless of the "terrain".

E.) THE EFFECT OF REASONABLENESS.

First, re: reasonableness - the respondents wrongly reference a "petitioners attack upon the California *Supreme Court* decision". *Respondent's Brief in Opposition*, hereinafter "*RB*", pp.25-33 (emphasis added) Clearly, the petitioners attack is upon the *appellate* court ruling in *Skoumbas v. City of Orinda*,165 Cal.App.4th at 787. The petition cites and discusses *Skoumbas* on four pages, and clearly *distinguishes* it from the California Supreme Court decision in *Locklin* (infra). *Petition*, pp. 3, 13, 14, 15. Yet the respondents do not even mention the *Skoumbas* case, and revolve their discussion around *Locklin*.

The petitioners' argument that reasonableness cannot here license an inverse condemnation without just compensation, is consistent with the United States Constitution. There is no provision in the U.S. Constitution which permits a government to take or damage private land for a public purpose without just compensation, if it merely acts "reasonably". The violation of any constitutional mandate is not sanctioned, merely because said violation was done "reasonably". Strict liability applies here. Moreover, no federal case has ever held that mere reasonableness excuses the payment of just compensation when land is taken or damaged by a government.

The respondents argue, based upon a narrowly construed *California* Supreme Court case, *Locklin v. City of Lafayette* (1994) 7 Cal.4th 327, which is critically distinguished from the instant case as well as *Skoumbas* (supra). *Locklin* provides a reasonableness test in unique circumstances where the government has historically been

privileged to damage private land under specific *riparian* circumstances, as outlined in pp.13-15 of the petition. The respondents cite no provision in the U.S. Constitution, or Federal case law which supports such an argument. Critically, even regarding California Supreme Court - *the instant case is not riparian*, involving *no* river or stream.

III. ADDITIONAL RESPONDENT MISSTATEMENTS.

A.) The first section of drainpipe and the drain inlet, as well as the street abutting the plaintiffs' properties are admitted to be County facilities. The respondents misstate, rather, that the entire length of pipe up to the curb is private. The initial pipe section is public, as respondents have *repeatedly admitted*. *RB*, p.1, par.1.

B.) The respondents misstate that the "explosion which eroded the backyard hillside of the petitioners' homes was caused by the broken-off and corroded drainpipe dangling over the cliff". *RB*, p.2, par. 3. This is a misstatement. At trial, the respondents offered no proof of the preceding statement. The actual complaint allegations are quoted on page 18 of the petition, including, in part, "[t]he public water coming from the public facilities described in paragraph 9 above, was the actual and legal cause of the massive landslide on the plaintiffs' lands." *Second-amended Complaint*. Moreover, in a demurrer ruling, only the "four corners" of the complaint are relevant.

C.) *RB* wrongly states "[t]he County of Ventura never built, owned, modified, acquired, operated, or controlled any waterworks or water bearing facilities adjacent to or upstream from the petitioners' homes". *RB*, p.6 (emphasis

added) The respondents misstate that "there is no government source of water whatsoever in, on, or adjacent to the subject street leading to petitioners' homes." *RB* p.7, par.1 The *RB* continues to misstate against the clearly established facts of this case, stating that "On page 16 of the certiorari petition, it is stated that 'County admittedly used said private land and pipe for County public street drainage...' This is either a misstatement or a rhetorical ruse." *RB*, p.33, par.3 (emphasis added) Even further, the respondents misstate that "[a]t no time did the respondent ever admit 'using' private land or the private pipe for any County drainage. This **unsourced** admission is typical of periodic, unsourced misstatements attributing an admission of fault to the respondent which simply never occurred. The respondent in this case never admitted using the private land for government street drainage." *RB*, p.34, par.2. (emph. added)

However, the Appellate Opinion, as well as a plethora of admissions contained in the trial record as well as briefings by the defendants, all show that the above respondent statements were misstatements made to the U.S. Supreme Court, including in part:

> "At the time of subdivision map approval, *the* ***County accepted the developer's offer*** *to* ***dedicate the STREETS*** *within the subdivision* – Otero Court, Estaban Drive, and Corriente Court – ***for public use***, *including the drain openings and pipe inlets located within the area of the County's right-of-way*". *Appellate Opinion, Petition Appendix "A"*, p. 2a (emphasis added).

"Prior to sale of the lots in the subdivision, the developer installed an 18-inch corrugated metal drainpipe in the easement [on petitioners land]. *The purpose of the pipe was to* ***drain surface waters*** *from the* ***subdivisions STREETS*** *down the hillside* ***to publicly-owned facilities*** *draining to the ocean.* Subsequently, a single family residence was constructed on each of the lots". *Appellate Opinion, Petition Appendix "A"*, pp.2a-3a (emphasis added)

Incredibly, the respondent *in their instant brief* state "[t]he jury determined that the **County property**, *a slightly downsloping* ***STREET*** which ***the County had accepted*** from the developer ... and *a drain* between the street and petitioners' private drainpipe". *RB*, p. 3, par.4 (emphasis added)

"[P]atently obvious ... no one was disputing that ***the source of the water emanated from the STREET***." *Respondent's Appellate Brief*, hereinafter "*RAB*" p.57, par.2.

"The evidence at trial was that the downsloping ***STREET*** *leading to the plaintiffs' homes* ... " *RAB*, p.6, par.3.

"Downsloping ***STREET*** *leading to a drainpipe*" *RAB* p.8, par.2 (emphasis added)

"The ***County-owned*** **drain inlets, such as the one in the front curb face of** the **SUBJECT PARCELS**, serve an extremely

> beneficial function by providing a safe exit ***for water flowing along the STREETS***." (Note plural "streets") *RAB* p.16, par. 1 (emphasis added)

The above quotes evidence the respondents perpetual effort to create confusion at every level in this matter, including confusion re: the distinction between the privately sited pipe, and the *admittedly public street and drainage facilities*, part of which direct public drainage through the petitioners lands, and in so doing severely damaged the subject private lands.

D.) The respondents misstate that under California law, "all theories of liability involving adventitious surface water flow are analyzed under a State Supreme Court decision entitled *Locklin v. City of Lafayette*, 7 Cal.4th 327 (1994)". *RB* p.7, par.4. *Locklin* is narrow, entirely inapplicable here, and includes *two* fact patterns, both of which focally/critically involve a natural river/stream. There is no river or stream in the instant facts, as has been articulated to the respondents countless times. Please refer to a partial list of cases in the petition, sect.6, p.11, which establish the general surface water rule in inverse condemnation: strict liability per *Albers* (supra, p.3 above). See II (E.) above.

E.) Respondents take issue with the petition, "the certiorari petition claims that the County knew that the public street drainage system would trigger the destabilization of the subject properties". However, the trial record clearly reflects that the County Transportation Director, a licensed Civil Engineer, was fully aware of and documented a land failure very near the petitioner's

homes four years before the instant land failure, in this very tract, related to a County drainage system which said Transportation Director called "identical" to the respondent's drainage system which directs the damage causing public drainage onto the petitioners' lands.

IV. CONCLUSION

Contrary to the respondents arguments which largely focus on issue intricacies related to the lower court trial in tort and also rely upon misstatements, the constitutional issues presented to this court by the petitioners *all* stem from the rulings of the Court of Appeal. These petitioners have argued truthfully to this court, and implore this court to search for and see the truth here, and grant the Petition for a Writ of Certiorari.

DATED: January 23, 2011.

Respectfully submitted,

RICHARD L MOOMAU
MOOMAU & ASSOCIATES
300 Esplanade Drive
Suite 900
Oxnard, CA 93036
(805) 981-3979

MARK ALAN PAPAY
Counsel of Record
LAW OFFICE OF
MARK ALAN PAPAY
300 E Esplanade Drive
Suite 900
Oxnard, CA 93036
(805) 981-3911
mark@landzoninglaw.com

Attorneys for Petitioners